United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

724

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,732

DONALD M. SULLIVAN, *Appellant*,

v.

THE COMMITTEE ON ADMISSIONS AND GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Appellee*.

Appeal From a Judgment of the United States District Court for the District of Columbia

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

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JOINT APPENDIX

SECTION 1 OF JOINT APPENDIX

Relevant Docket Entries

1964

Jan. 21—Charges of the Committee on Admissions and Grievances of the U.S. District Court for the District of Columbia against Donald M. Sullivan (Fiat—McGuire, C.J.) filed.

Dec. 15—Answer of Donald M. Sullivan to Charges; Exhibit "A"; filed.

1965

May 6—Stipulation of Grievance Committee and Counsel for Respondent. Exhibits A, B & C. filed.

May 25—Memorandum opinion dismissing cause (order to be presented) McGuire, C.J.; Youngdahl, J.; & Walsh, J.

June 21—Order dismissing charges. McGuire, C.J.; Youngdahl, J.; Walsh, J. (signed 6/18/65)

July 21—Notice of Appeal by Donald M. Sullivan. filed.

(Filed January 21, 1964)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 1-64

In the Matter of the
Complaint against DONALD M. SULLIVAN,
A Member of the Bar of the United States District Court
For the District of Columbia

Charges of the Committee on Admissions and Grievances

The Committee on Admissions and Grievances of the United States District Court for the District of Columbia charges as follows:

1. That the respondent, Donald M. Sullivan, is a member of the bar of the United States District Court for the Dis-

trict of Columbia, having been admitted to practice on February 9, 1942.

2. That in the matter of the Estate of Margaret Delano Gage, Deceased, Administration No. 105,442, the respondent was employed to represent the American Archives Association which had secured Agreements and Assignments by 12 of the 14 heirs under which the 12 heirs agreed to pay to the Association 40% of any amounts received by said heirs for and in consideration of the efforts of the Association in finding them and advising them of their interest in an estate, and for its services in establishing their heirships.

3. That with the knowledge and consent of the respondent, the American Archives Association solicited the employment of the respondent by the heirs, and that the respondent accepted employment by the heirs and has represented the heirs with the understanding that he would look to the Association alone for his compensation.

4. That the respondent, Donald M. Sullivan, filed a petition in the matter of the Estate of Margaret Delano Gage, deceased, Administration No. 105,442, appearing solely in behalf of the 12 heirs who were under contract with the American Archives Association; that he did not appear as attorney for the American Archives; that he was expected, however, to cooperate with the American Archives Association in arranging that the heirs under contract with the American Archives Association would, as a condition precedent to the receipt of the distribution, make payment to the American Archives Association of the amount due to said association under the contracts with the heirs; that in representing the heirs under contract with the American Archives Association and in representing the American Archives Association there was a conflict of interests; that his conduct in these respects was in violation of Canon 28 of the Canons of Professional Ethics relating to the stirring up

of litigation; Canon 27, condemning the solicitation of professional employment; Canon 16, requiring that a lawyer use his best efforts to prevent his clients from doing those things which the lawyer himself ought not to do; Canon 35, prohibiting the control of the services of a lawyer by any lay agency, personal or corporation, which intervenes between client and lawyer; and Canon 6, making it unprofessional to represent conflicting interests.

5. Upon the facts herein set forth, the Committee on Admissions and Grievances of the United States District Court for the District of Columbia charges and avers that the respondent, Donald M. Sullivan, has violated Canon 28 of the Canons of Professional Ethics, relating to the stirring up of litigation, directly or through agents; Canon 27, condemning the solicitation of professional employment; Canon 16, requiring that a lawyer use his best efforts to prevent his clients from doing those things which the lawyer himself ought not to do; Canon 35, prohibiting the control of the services of a lawyer by any lay agency, personal or corporate, which intervenes between client and lawyer; and Canon 6, which makes it unprofessional to represent conflicting interests; and has been guilty of professional misconduct and conduct prejudicial to the administration of justice.

WHEREFORE, the premises considered, the Committee on Admissions and Grievances of the United States District Court for the District of Columbia prays:

(1) That these charges be filed with the Clerk of this Court and that the respondent, Donald M. Sullivan, be tried upon said charges, pursuant to the statutes made and provided, and the rules of this Court.

(2) That the Clerk of this Court shall be directed forthwith to issue a summons to respondent commanding him to appear herein on a day certain and answer said charges.

(3) That in the event service of summons cannot be made upon respondent in the District of Columbia, that service be made in accordance with Rule 94(f) of the Local Rules of the United States District Court for the District of Columbia.

(4) That respondent, Donald M. Sullivan, be forthwith suspended or disbarred from further practice of the law before the Bar of this Court and also from holding himself out to be an attorney at law in the District of Columbia.

(5) And for such other and further relief as the nature of the case may require and to this Court may seem just and proper in the premises.

THE COMMITTEE ON ADMISSIONS AND GRIEVANCES
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

By: /s/ EDMUND L. JONES
Edmund L. Jones

/s/ FRANCIS W. HILL
Francis W. Hill

/s/ ROGER ROBB
Roger Robb
Members

DISTRICT OF COLUMBIA, SS:

Edmund L. Jones, being first duly sworn, on oath deposes and says that he has read the foregoing charges signed by him, and by Francis W. Hill, and Roger Robb on behalf of the Committee on Admissions and Grievances of the United States District Court for the District of Columbia and knows the contents thereof; that as a member of

said Committee he believes that the matters and things therein set forth are true.

/s/ Edmund L. Jones
Edmund L. Jones

(Notarial Seal)

Subscribed and Sworn To Before Me This 16th day of December, 1963

/s/ Nellie R. Bair
Notary Public

By direction of the Court
Let this charges be filed:

/s/ Matthew F. McGuire
Chief Judge

Jan. 20, 1964

(Filed December 15, 1964)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 1-64

Answer to Charges

First Defense

The Charges fail to state any charge against the respondent that would support or justify any disciplinary action against respondent, and fail to allege any facts warranting any such action. The facts alleged in the Charges, even if true, would constitute proper and ethical conduct.

Second Defense

The Charges fail to charge the respondent with any unprofessional or unethical conduct, or with any improper conduct, or with any conduct prejudicial to the administra-

tion of justice, and fail to allege any facts that would support any such charge.

Third Defense

1. Respondent admits that he is a member of the bar of the United States District Court for the District of Columbia, and that he was admitted to practice before this Court on February 9, 1942.

2. Respondent admits that he was employed by American Archives Association to represent the interests of American Archives Association under the partial assignments theretofore received by said Association from paternal heirs of Margaret Delano Gage. The form of the "Agreement and Assignment" executed by each of the paternal first cousins is attached hereto as Exhibit "A". Each such "Agreement and Assignment" expressly assigned a two-fifths interest to American Archives Association at the time it was signed by each heir, and each such assignment of a two-fifths interest was executed by each heir in favor of American Archives Association prior to the heir's employment of respondent as his or her attorney. Respondent denies each and every one of the remaining allegations of paragraph 2 of the Charges.

3. Respondent denies that the American Archives Association improperly solicited the employment of respondent by said heirs, or any of them, and denies that his employment by said heirs, or any of them, was improperly solicited by American Archives Association or anyone else with respondent's knowledge or consent. Respondent states that he was willing to represent the paternal heirs without payment of fee by them because the American Archives Association had already agreed to pay him an adequate fee for representing its interests under the aforementioned partial assignments from the paternal heirs, and there was a community of interest between the American Archives Association and the paternal heirs. Respondent states that

each of the paternal heirs employed respondent as his or her attorney after full disclosure had been made to him or her of the respondent's representation of the interests of American Archives Association, and of the fact that respondent would look only to American Archives Association for his fee.

4. Respondent admits that on May 18, 1962 he filed a cross-petition for letters of administration in the Estate of Margaret Delano Gage, Administration No. 105,442, opposing the appointment of an alleged creditor named Marvin whose petition seeking her own appointment had been filed on March 22, 1962. That the aforesaid cross-petition filed by respondent was on behalf of Harold Calvin Gage, who was one of the paternal heirs represented by respondent, and requested the appointment of The National Bank of Washington as Administrator. Respondent admits that he did not appear as attorney for the American Archives Association, and denies that he had any duty to do so. Respondent denies that the twelve paternal heirs, or any of them, were "under contract" with the American Archives Association in any sense other than that they had theretofore signed a document containing a combined agreement to assign and an actual assignment to American Archives Association. Respondent denies that there was any conflict of interest between his respective clients and denies each and every one of the remaining allegations of paragraph 4 of the Charges.

5. Respondent denies each and every allegation of paragraph 5 of the Charges and denies that he has violated any of the Canons of Professional Ethics.

Fourth Defense

The conduct of respondent was entirely proper and ethical and supported by numerous precedents, including the following:

1. Opinion 111 of the American Bar Association's Committee on Professional Ethics and Grievances—permitting

an attorney to accept as clients persons in a similar situation to that of an original client, if they, without the attorney's active intervention, be persuaded by the original client to employ the attorney.

2. Opinion 282 of the American Bar Association's Committee on Professional Ethics and Grievances, permitting an attorney to represent several persons despite even a known possibility of future conflict of interest between such persons and permitting the representation of definitely conflicting interests if all concerned consent to the joint representation.

3. Informal Decision No. 679 of the American Bar Association's Standing Committee on Professional Ethics, issued July 1, 1963, approving an arrangement whereby an attorney would be paid by A for representing B, and in which opinion it was specifically recommended that the attorney write directly to B to promptly establish the lawyer-client relationship.

4. The identical or substantially the same practices of American Archives Association and attorneys representing the Association and assigning heirs were investigated on behalf of the Board of Directors of the Bar Association of the District of Columbia in 1951 or 1952, and by the Committee on Unauthorized Practice of Law of the Bar Association of the District of Columbia in 1957, and each time found unobjectionable.

5. The validity of assignments given to the American Archives Association, which were identical in form to those given to it by the paternal heirs of Margaret Delano Gage, was sustained on May 1, 1959 by this Court in the *Estate of Clyde R. Lott, Deceased,* Administration No. 86,184.

6. Precisely the same procedure as that of which the Committee now complains has been followed for years by eminent and reputable attorneys in this jurisdiction and throughout the country, the respondent merely following

in the footsteps of such other reputable attorneys, and the Grievance Subcommittee itself conceded at Pages 5 and 6 of its "REPORT AND RECOMMENDATION TO THE COURT BY THE GRIEVANCE SUBCOMMITTEE OF THE COMMITTEE ON ADMISSIONS AND GRIEVANCES WITH REFERENCE TO THE CONTROVERSY BETWEEN DONALD M. SULLIVAN, A MEMBER OF THE BAR OF THE COURT, AND THEODORE COGSWELL, REGISTER OF WILLS", that it was known to the Committee "that other reputable members of the bar of this Court had represented the American Archives Association under somewhat similar circumstances."

7. Under Canon 6 of the Canons of Professional Ethics, even the representation of actually conflicting interests is permitted with the express consent of all concerned after full disclosure of the facts. The pertinent language of Canon 6 is as follows:

> "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

Fifth Defense

Respondent undertook his representation of the aforesaid twelve paternal heirs in good faith, and the Grievance Subcommittee has so admitted in writing. Such admission is contained in the aforementioned Report and Recommendation by the Grievance Subcommittee, in which it is expressly stated that the Committee felt that respondent had "undertaken his representation of the heirs in good faith". A copy of said Report, dated December 16, 1963, is now of record herein as Exhibit "A" to the Motion to Dismiss Complaint (Charges) previously filed herein by respondent, and the above-quoted language appears on Page 5 of said Report.

Sixth Defense

The Committee on Admissions and Grievances violated the Rules of this Court and otherwise deprived respondent of due process of law and a fair investigation and hearing in numerous respects.

/s/ DONALD M. SULLIVAN
Donald M. Sullivan, *Respondent*
430 Washington Building
Washington 5, D. C.

/s/ H. MASON WELCH
H. Mason Welch
Investment Building,

/s/ JUSTIN L. EDGERTON
Justin L. Edgerton
Washington Building,

/s/ ANDREW A. LIPSCOMB
Andrew A. Lipscomb
Washington Building,

/s/ J. JOSEPH BARSE
J. Joseph Barse
Investment Building,
Washington 5, D. C.
Attorneys for Respondent.

[Exhibit "A"—"Agreement and Assignment" form—is omitted at this point because it is printed herein at Pages 15 and 16 as Exhibit A to the "Stipulation" filed May 6, 1965.]

(Filed May 6, 1965)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 1-64

Stipulation

It is hereby stipulated and agreed by and between counsel for the Respondent, Donald M. Sullivan, Esquire, and counsel for the Committee on Admissions and Grievances of the United States District Court for the District of Columbia, as follows:

1. That about the middle of April, 1962, the Respondent was retained by the American Archives Association to represent its interests under assignments which it had secured from non-resident and previously unknown heirs of Margaret Delano Gage, deceased. Copy of the assignment form used, entitled "Agreement and Assignment", whereby the heir assigned to American Archives Association two-fifths of the property of the decedent to which such heir was entitled, is attached hereto and made a part hereof as Exhibit "A".

2. Shortly after Respondent's employment by American Archives Association, Respondent was asked by American Archives Association if he had any objection to its acquainting its assignors with the fact that Respondent was representing the interest of American Archives Association or to its telling such assignors that if any of them should desire to avail themselves of Respondent's services in the matter, Respondent would be willing to represent them also and without charge. Respondent stated to American Archives Association that he had no objection to its so doing. Thereafter, the Association wrote to each of its assignors (being 12 of the 14 heirs at law and next of kin of the decedent) so advising them. See copy of letter of April 24, 1962, attached hereto as Exhibit "B", and particularly paragraphs 4 and 5 thereof.

3. A form of authorization (Exhibit "C" attached hereto) was transmitted by American Archives Association to each of its assignors with the said Exhibit "B", by which such heir, if he chose to do so, could authorize the Respondent to represent him in the collection of his share of the estate. All twelve of the heirs from whom American Archives Association had received assignments did sign such authorizations and Respondent undertook their representation also. At the time Respondent undertook to represent the heirs, each heir knew that Respondent also represented the interest of American Archives Association (See Exhibits "B" and "C").

4. At the time of his retainer by the American Archives Association, the Respondent knew that in similar cases, for many years, and right up to the time of his retainer in the Gage matter, other reputable attorneys practicing in the District of Columbia, known personally to him, had represented and been retained by both the American Archives Association and the heirs who had made assignments of portions of their interests to it.

5. Respondent undertook his representation of the American Archives Association and the heirs in good faith. After the Respondent was advised by the Grievance Subcommittee that it questioned whether Respondent's representation of American Archives Association and the paternal heirs was in conformity with the canons of ethics as to solicitation and as to conflict of interest, Respondent continued to represent the paternal heirs and the American Archives Association. Respondent advised the Grievance Subcommittee as to his reasons for so continuing, and that according to his understanding of the law in this jurisdiction there was no conflict of interest and no solicitation; that if a conflict should arise he would promptly suggest to his clients the need for separate representation; and because of his understanding of his duties and obligations to his clients he did not feel that he could or should withdraw.

6. Respondent expressly reserves all procedural objections heretofore made by him herein.

7. Subject to the approval of the Court, this cause is hereby submitted to the Court for decision upon this stipulation of the essential facts.

FOR THE COMMITTEE ON ADMISSIONS AND GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

/s/ EDMUND L. JONES
Edmund L. Jones

/s/ FRANCIS W. HILL
Francis W. Hill

/s/ ROGER ROBB
Roger Robb
Counsel.

FOR RESPONDENT:

/s/ H. MASON WELCH
H. Mason Welch

/s/ JUSTIN L. EDGERTON
Justin L. Edgerton

/s/ ANDREW A. LIPSCOMB
Andrew A. Lipscomb
Counsel.

[Filed May 6, 1965 as Exhibit A to Stipulation in Misc. No. 1-64]

AGREEMENT AND ASSIGNMENT

IN THE MATTER OF THE ESTATE OF

.....

For and in consideration of American Archives Association, or its agent, having revealed to me the fact that there is a fund of money or other assets which may be due me from the above entitled estate, or source, as well as in further consideration of its time, effort and expense in investigating and endeavoring to procure proof of relationship and interest therein, I do hereby agree to and by these presents do hereby grant, bargain, sell, convey, transfer, set over and assign unto the said American Archives Association an undivided two-fifths (2/5) .... of all my right, title and interest in and to said fund of money, property, real or personal, joint bank account, insurance or other assets left by said deceased, and in any claims arising directly or indirectly out of the death of said deceased, or other assets awarded to me therefrom. I shall not be liable for expenses incurred by American Archives Association in investigating and procuring proof of my relationship.

All of the above shall be binding upon my executors, administrators, heirs and assigns.

WITNESS my hand and seal this .... day of ....., 19.....

WITNESSED BY:

.....

.....

.....(L.S.)

.....(L.S.)

.....(L.S.)

.....
} ss:
.....

On this .... day of ....., 19..., before me, a Notary Public in and for the County and State aforesaid, personally appeared .....
.....
.....
.....
.....
known to me to be the person whose name is subscribed to the within instrument, and.....he duly acknowledged to me that....he executed the same, and the said person being by me first duly sworn, did severally declare that.....he executed said instrument of.....h..... free will, act and deed, with full knowledge of all the contents thereof and as for the objects and purposes therein stated.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day, month and year in this certificate first above written.

.....
Notary Public in and for the County
of .....
and state of .....
My Commission expires .....

[Filed May 6, 1965 as Exhibit B to Stipulation in Misc. No. 1-64]

Airmail April 24, 1962

Mr. William G. Haseltine
22 Fletcher Road
Belmont 78, Massachusetts

Re: Estate of MARGARET DELANO GAGE

Dear Mr. Haseltine:

This will acknowledge receipt of the Assignment you executed in our favor, for which we thank you. We also wish to thank you for the courtesies you extended to our Mr. Brickley during his visit with you.

The estate, as above captioned, is that of Margaret Delano Gage. Miss Gage died in the District of Columbia on February 7, 1962. Subsequently an estate proceeding was filed wherein it was alleged that Miss Gage died without heirs. The District of Columbia filed claim to the estate and alleged that the estate should escheat to the District of Columbia for lack of heirs and, in all probability had this office not learned of the matter, the estate would have escheated to the District of Columbia.

This office became acquainted with the matter several weeks ago and immediately commenced an investigation with a view toward identifying and locating the decedent's relatives and heirs. We commenced our investigation here in the District of Columbia and the clues compiled led us to New Hampshire and Vermont, and eventually to Minnesota, Arizona, Washington, Massachusetts and California. We are pleased to inform you that our extensive research has been rewarded and we have now identified and located all of the persons whom we believe to be entitled to share in the estate. We are very pleased that you have availed of our service.

Mr. Donald M. Sullivan, an attorney with offices in Suite 430 Washington Building, Washington 5, D. C., has been

engaged to protect the interests of American Archives Association in the estate and, since your interest is identical with that of American Archives Association inasmuch as your right must be fully established before it can be determined how much is payable to American Archives Association under the Assignment, Mr. Sullivan is willing to serve as attorney of record for you as well. He will, of course, look to American Archives Association alone for his compensation.

We are enclosing the usual form of authorization, a copy of which you may keep for your file. If you will sign the original and return it at your early convenience, we shall forward it to Mr. Sullivan to expedite his work and so that he may proceed appropriately with respect to the administration of the estate.

Very truly yours,

AMERICAN ARCHIVES ASSOCIATION

f/g
enclosures.

[Filed May 6, 1965 as Exhibit C to Stipulation in Misc. No. 1-64]

9346 Vineyard Crest
Bellevue, Washington
May 1, 1962

Mr. Donald M. Sullivan
Attorney at Law
Suite 430, Washington Building
Washington 5, D. C.

Dear Mr. Sullivan:

I am informed, and believe, that I am entitled to share in the Estate of MARGARET DELANO GAGE.

I, therefore, authorize you to enter an appearance for me and to represent me in the collection of my share of

this estate. I understand you also represent the interest of American Archives Association and that you will look to it alone for your fee in this matter.

Sincerely yours,

/s/ Ruth G. Dolliff (Mrs.)
Ruth G. Dolliff

(Filed May 25, 1965)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous No. 1-64

Memorandum Opinion

Per Curiam: This matter comes before the Court by way of submission on a stipulated set of facts.

The background out of which the controversy arose is set forth in *Gage et al.* v. *The Riggs National Bank of Washington, D. C.*, slip opinion U. S. App. D. C. No. 18,515, decided January 21, 1965, 342 F. 2d 935 (1965), 320 F. 2d 714 (1963), 115 U.S. App. D. C. 396 and in the matter of the Estate of Margaret Delano Gage, deceased, Administration No. 105422.

While the legal questions presented are formally before the Court for the first time[1] for definitive action, the activities of the particular Association (American Archives Association) and its relation to various members of the profession have not been unknown to the Bar. While a question has been raised from time to time about this relationship and its propriety no formal action has ever been taken and no challenge ostensibly made to distribu-

[1] See generally, however, *Merlaud* v. *National Metropolitan Bank of Washington, D. C.*, 65 App. D. C. 385 et seq. 1936.

tion under the assignments or contracts entered into. Yet *Merland, infra,* in itself should have flashed a warning light to those concerned in the particular factual picture presented here.

That the Bar itself has never taken formal action is regrettable since the Court has been informed by the Committee on Admissions and Grievances[2] that the matter of the particular Association and its relationship with counsel in this jurisdiction over the years in different cases has been discussed.

It is the view of the Court, and we so hold, that such relationship partakes of the nature of champerty, amounts to the solicitation of professional employment, permits the intervention of a lay agency between attorney and client, foments litigation and intrudes upon the duty requiring counsel to use his best efforts to restrain and prevent the client from doing things which the lawyer himself ought not to do.

We are not disposed, however, to enter any formal order of censure against the respondent while others similarly situate remain untouched in the wings because the question has hitherto not been formally raised.

Nevertheless this result is not to be taken as leading either to the conclusion or to the inference that the Court subscribes to the attenuated form of reasoning which presumes to assert that what has been done in the past by others under similar arrangements with the same Association, or indeed with any other organization, corporate or otherwise, or with any lay individual, can be done with impunity because the question of its propriety has never been formally raised. Such past conduct does not clothe the fault itself in the habiliments of professional recitude.

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[2] Report and recommendation to the Court by the Sub-committee on Grievances of the Committee on Admissions and Grievances with reference to the controversy between Donald M. Sullivan, a member of the Bar of this Court, and Theodore Cogswell, Register of Wills, filed April 27, 1964, pages 5 and 6 therein.

Nor is good faith or the lack of bad faith an exculpatory circumstance. So much for the case itself and the questions raised.

We recommend also in order to dissipate any lingering doubts as to where the Court stands, that in matters of this kind affecting not only the named Association or others, individual, corporate or otherwise, and the profession, that a rule be adopted as soon as possible by the full Court—since it alone has vested in it the rule making power—formalizing monitorial guidance to the Bar and implemental and administrative direction to the Register of Wills.

Cause dismissed upon submission of proper order.

MATTHEW F. McGUIRE
Matthew F. McGuire, *Chief Judge*

LUTHER W. YOUNGDAHL
Luther W. Youngdahl, *Judge*

LEONARD P. WALSH
Leonard P. Walsh, *Judge*

May 25, 1965

(Filed June 21, 1965)
Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 1-64

Order

This matter came on for hearing upon the charges filed by the Committee on Admissions and Grievances of this Court, the Answer of the respondent, Donald M. Sullivan, the Stipulation of Facts filed on the 6th day of May, 1965, and was submitted to the Court on said record. This Court having rendered its Memorandum Opinion of May 25, 1965,

in which are set forth its Findings of Fact and Conclusions of Law, it is for the reasons set forth in said Memorandum Opinion this 18th day of June, 1965,

ORDERED, that the charges be and the same are hereby dismissed.

/s/ MATTHEW F. MCGUIRE
Matthew F. McGuire, *Chief Judge*

/s/ LUTHER W. YOUNGDAHL
Luther W. Youngdahl, *Judge*

/s/ LEONARD P. WALSH, JR.
Leonard P. Walsh, *Judge*

(Filed July, 21, 1965)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 1-64

Notice of Appeal

Notice is hereby given this 21st day of July , 1965, that Donald M. Sullivan hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from so much of the final judgment of this Court entered on the 21st day of June, 1965 as is erroneous and prejudicial to the appellant, which appellant designates as all but the first sentence and the last sentence of the Memorandum Opinion (Findings of Fact and Conclusions of Law) incorporated without basis in the said final judgment as reasons for said judgment.

/s/ DONALD M. SULLIVAN
Donald M. Sullivan, *Appellant*,
430 Washington Building,
15th & New York Ave., N.W.
Washington, D. C. 20005

SECTION 2 OF JOINT APPENDIX

(Printed at instance of Appellee)

Report and Recommendation to the Court by the Grievance Subcommittee of the Committee on Admissions and Grievances With Reference to the Controversy Between Donald M. Sullivan, a Member of the Bar of the Court, and Theodore Cogswell, Register of Wills.

The controversy here in question arose as a result of a letter, dated June 15, 1962, addressed to Mr. Sullivan by the Register of Wills relating to the Estate of Margaret D. Gage, Deceased, Administration No. 105,442, and Mr. Sullivan's efforts to have this letter expunged from the record.

Judge Tamm held a conference in his chambers on this matter, at the request of Mr. Sullivan, on June 19, 1962, and as a result of the discussion addressed a memorandum to Chief Judge McGuire recommending that the matter be referred to the Committee on Admissions and Grievances for investigation and report. Judge McGuire referred Judge Tamm's memorandum to Judge Sirica, then the judge in liaison with the Committee who, in turn, sent the material to the Committee with the request that it conduct an investigation and submit its report and recommendation to the Court. The Grievance Subcommittee was delegated by the Committee to proceed. Attached hereto are the following exhibits: Exhibit (1) Copy of Mr. Cogswell's letter of June 15, 1962 to Mr. Sullivan; Exhibit (2) Copy of Mr. Sullivan's letter to Mr. Cogswell of June 18, 1962; Exhibit (3) Copy of Judge Tamm's memorandum of June 21, 1962; Exhibit (4) Copy of Chief Judge McGuire's memorandum to Judge Tamm of June 21, 1962; and Exhibit (5) Copy of Judge Sirica's memorandum to the Committee of June 28, 1962.

Nature of Controversy

Judge Tamm, in his memorandum of June 21st, 1962, stated that at the conference held in his chambers on the

19th, Mr. Sullivan demanded the removal from the file of Mr. Cogswell's letter to him of June 15th, and, in addition, charged that Mr. Cogswell and his assistant were biased and prejudiced towards him and that this bias and prejudice was influencing their official conduct in the case. Further, that Mr. Sullivan accused Mr. Cogswell of a "diabolical conspiracy" in the case and in other heated and intemperate language accused Mr. Cogswell of falsely accusing him of "champertous" conduct and with violation of a Canon of Legal Ethics, and that included in his charges was the claim that Mr. Cogswell was usurping authority of the Court and was acting without authority in preparing and sending his letter of June 15th.

Judge Tamm also stated in his memorandum that Mr. Cogswell took the position that his letter of June 15th was an effort on his part to determine from his letter and any response made thereto by Mr. Sullivan, what the facts were in the situation in order that he could determine whether the matter was one which he might have to bring to the Court's attention; that Mr. Cogswell recited in detail facts and circumstances in the case which prompted him to assume that Mr. Sullivan's action might constitute an effort on the part of Mr. Sullivan to overreach opposing counsel in the contest for letters of administration.

Proceedings Before Committee

A copy of Judge Tamm's memorandum was sent to Mr. Cogswell and to Mr. Sullivan by the Committee with the request that they furnish it a detailed statement of their positions on or before July 23, 1962, and with the advice that an oral hearing in the matter would be held on Monday, July 30th. As requested both Mr. Cogswell and Mr. Sullivan furnished the Committee with lengthy and detailed statements setting forth their respective positions.

Because of planned absences from the city during the summer months, it was found necessary to continue the scheduled hearing and the fixing of another date was further delayed because of the extended illness of James C. Wilkes, Esq., counsel for Mr. Sullivan.

The first hearing was held on March 20, 1963, and the following appeared and were heard at length: Mr. Sullivan and his counsel, James C. Wilkes, Esq., Justin L. Edgerton, Esq., and Andrew A. Lipscomb, Esq.; Mr. Theodore Cogswell, the Register of Wills; Mrs. Maude R. Pryse; Harry Tyson Carter, Esq. the attorney for the two heirs of the decedent on the maternal side; Officer Robert W. Russell of the Metropolitan Police; Mrs. Marjorie Aiken, an employee of S. H. Hines Co.; Mr. Frank Hines, of the Hines Funeral Home; Dudley G. Skinker, Esq., onetime secretary of the Bar Association of the District of Columbia; and Richard L. Merrick, Esq., onetime chairman of the Bar Association's Committee on Unauthorized Practice of Law.

The hearing was commenced at about 10 o'clock and, except for a very brief recess for luncheon and for a break of less than an hour early in the afternoon to permit the Committee to hear two other matters which had been scheduled, lasted until about 5:30 o'clock.

At the conclusion of this hearing it was agreed that counsel for Mr. Sullivan would, within the period of one week, submit to the Committee a written brief and serve copies on Mr. Cogswell and Mrs. Pryse who, in turn, would be allowed one week to file any answers or comments they desired to make. Mr. Carter announced that he did not desire to make any further statement or to receive a copy of the brief submitted in behalf of Mr. Sullivan.

The statements requested were received and were carefully considered by the Committee at a special meeting held on Tuesday, April 23, 1963. The conclusion was reached that Mr. Sullivan should be questioned further

and a letter was directed to his counsel, Mr. Wilkes, advising him that the matter had been set down for another hearing on Wednesday, May 1, 1963.

Because of Mr. Wilkes' commitments it was necessary to continue this scheduled hearing until Thursday, June 27, 1963, when there appeared and were heard the following; Mr. Cogswell; Mr. Sullivan and his counsel, James C. Wilkes, Justin L. Edgerton, and Andrew A. Lipscomb; Mrs. Maude Pryse; Harry Tyson Carter; James D. Graham, Jr., General Counsel of the American Archives Association, and his counsel, Vincent Fuller.

In connection with the hearings above referred to numerous statements and briefs, together with exhibits, consisting of nearly two hundred pages were filed with the Committee.

Facts Developed

There were 14 Gage heirs, 12 of these on the paternal side and two on the maternal side. The American Archives Association secured contracts with the 12 heirs on the paternal side by which these heirs agreed to pay to the Association 40% of any amounts received by the heirs as compensation for the Association finding them and advising the heirs of their interest in the estate, and for its services in establishing their heirship, and the Association employed Mr. Sullivan to represent it in this matter.

The American Archives Association, with the knowledge and consent of Mr. Sullivan, wrote to all of the heirs with whom they had contracts stating that their interest and the interest of the association were identical, advising them that Mr. Sullivan had been engaged to protect the interest of the association, and that Mr. Sullivan was willing to serve as attorney of record for them as well. These letters further advised that Mr. Sullivan would look to the associaton alone for his compensation.

Prior to the hearing on June 27, 1963, above referred to, the Committee had called to the attention of Mr. Sullivan's attorneys the case of *Merlaud* v. *National Metropolitan Bank of Washington,* 65 App. D.C. 385, and to certain cases cited in a note entitled "Heir Hunting" in 171 ALR 351, and other cases on the same subject which had been decided subsequent to the compilation of the A.L.R. note. These cases hold that contracts similar to the one entered into between the American Archives Association and certain of the Gage heirs are champertous and void.

At the June 27th hearing the cases dealing with this subject were discussed with counsel for Mr. Sullivan and counsel for the American Archives Association and Mr. Sullivan's counsel indicated that in their opinion the cases referred to were not applicable or could be distinguished. While not requesting them to do so, the Committee stated to counsel that it would be glad to receive a memorandum pointing out in what respects the conduct of Mr. Sullivan could be distinguished from the prohibited action outlined in the cases which had been brought to their attention.

At the hearing on June 27th it was developed that it was the practice of American Archives Association, as assignee of the heirs under contract with it, to make arrangements so that at the time of distribution to the heirs and concurrently with the payment to the heirs, that the heirs, as a condition precedent to receiving their distribution, would make payment to the American Archives Association of the amount due under their contracts with American Archives, and that American Archives would expect its attorney (in this case Mr. Sullivan) to cooperate in working out this arrangement.

In response to this invitation counsel for Mr. Sullivan, under date of July 17, 1963, submitted a brief of 35 pages, with exhibits, in which they sought to make a distinction between this case and the cases referred to them by the

Committee, and in which they also discussed other cases dealing with the subject developed through their own research.

Conduct of Mr. Sullivan

After these hearings the Committee carefully reviewed the entire record and reached the conclusion that at the time Mr. Sullivan undertook the representation of certain of the Gage heirs he was not conscious of the fact that he was guilty of any impropriety and that he accepted the employment in good faith.

The Committee felt, however, in view of the court decisions in respect to contracts quite similar to those involved here, that there was a conflict of interest between the American Archives Association and the Gage heirs. It was the view of the Committee that independent counsel having no responsibility to the association would have the duty to advise the heirs that there was ground to test the validity of these contracts should they care to do so.

The Committee also felt that when the American Archives solicited the employment of Mr. Sullivan by the heirs, with the knowledge and consent of Mr. Sullivan, that this was a violation of Canon 28 of the Canons of Professional Ethics, relating to the stirring up of litigation, directly or by an agent; of Canon 27, condemning the solicitation of professional employment; of Canon 16, requiring that a lawyer use his best efforts to restrain and to prevent his client from doing those things which the lawyer himself ought not to do; and of Canon 35, prohibiting the intervention of a lay agency between the attorney and his client.

Because of its feeling that Mr. Sullivan had undertaken his representation of the heirs in good faith, and it having become known to the Committee during the hearings that other reputable members of the bar of this Court had

represented the American Archives Association under somewhat similar circumstances, a discussion of the matter with Mr. Sullivan's attorneys was deemed advisable and a conference with them was requested. A meeting with his counsel was held on July 30th and a full discussion had. At this meeting the Committee advised Mr. Sullivan's counsel of the Committee's view that Mr. Sullivan's conduct, though perhaps undertaken innocently, was in violation of the above mentioned canons, and that there was a conflict of interests between his clients and the American Archives Association. The Committee indicated that it would recommend to the Court that no disciplinary action be taken if Mr. Sullivan concurred in these views and would address a letter to the Committee stating, in substance, that although he had undertaken the representation of the Gage heirs in good faith he now realized that some questions might be raised as to the propriety of his actions, and that, therefore, in order to avoid the direction of any criticism against him, he was withdrawing from the case and would not undertake a similar representation under like circumstances should the occasion arise.

The views and proposal of the Committee were conveyed to Mr. Sullivan by his attorneys and, at his request, another conference with his counsel was scheduled. This meeting with his counsel was held on September 5th and another lengthy discussion took place. On this occasion the Committee reiterated its views and proposal, and requested a prompt answer from Mr. Sullivan. The Committee was particularly careful to point out that it was not attempting to coerce Mr. Sullivan in any way, and that indeed it had a strong conviction that he should not agree to the proposal should he be convinced, after a careful consideration of the entire matter, of the propriety of his actions.

Mr. Sullivan advised the Committee by letter dated the next day, September 6th, that he could not consent to

its suggestion. A copy of his letter is attached hereto, Exhibit (6).

In view of Mr. Sullivan's position, the Committee recommends that the Court authorize the filing of the proposed charges, copies of which are submitted herewith

Conduct of Mr. Cogswell

The Committee is of the opinion that neither Mr. Cogswell nor any member of his staff were biased or prejudiced against Mr. Sullivan and that their official conduct in the Gage case was proper and was in no way influenced by their personal feelings toward Mr. Sullivan.

THE COMMITTEE ON ADMISSIONS AND GRIEVANCES
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

By: EDMUND L. JONES
Edmund L. Jones

FRANCIS W. HILL
Francis W. Hill

ROGER ROBB
Roger Robb
MEMBERS

December , 1963

EXHIBIT (1)

OFFICE OF REGISTER OF WILLS AND CLERK OF THE DISTRICT COURT
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Washington 1, D. C.

THEODORE COGSWELL
Register and Clerk

June 15, 1962

Donald M. Sullivan, Esquire
Attorney at Law
430 Washington Building
Washington, D. C.

Dear Mr. Sullivan,

The enclosed photostat copies of letters from the S. H. Hines Company dated June 14, 1962, one addressed to this office and the other to you in connection with your attempted payment of the funeral expenses of Margaret D. Gage, deceased, which were guaranteed by Mrs. Dorothy B. Marvin, applicant for letters of administration upon her estate, are self-explanatory.

You are, of course, familiar with Local Civil Rule 46 which requires this office to immediately advise the Court of any apparent irregularity or default in connection with the administration of estates, and the pleadings in the estate of Margaret Delano Gage, deceased, Administration No. 105,442 would appear to clearly indicate that your only reason for attempting to pay the funeral bill guaranteed by Mrs. Marvin, your opposing Petitioner for Administration who is represented by her own counsel, who, together with Mrs. Marvin, knew nothing of your action, was for the purpose of destroying her claim for administration as a creditor prior to the scheduled hearing and substituting yourself or your client in her place and stead. In the absence of a satisfactory explanation such action

might be termed champertous and a violation of the Canon of Legal Ethics.

This office requests your explanation prior to the hearing in Motions Court on June 20th next.

Very respectfully,

/s/ THEODORE COGSWELL
Register of Wills
Clerk of the probate Court

TC:ib
CC: Shanley, Fisher & Kuykendall, Esquires
1815 H St., N.W.
Washington, D. C.

and

Maude R. Pryse
#2 Dupont Circle, N.W.,
Washington 6, D. C.

EXHIBIT (2)

June 18, 1962

Mr. Theodore Cogswell,
Register of Wills and Clerk
of the Probate Court,
United States Courthouse
Washington 1, D. C.

Dear Sir:

Re: Estate of Margaret D. Gage,
Deceased, Admn. No. 105,442.

This is to acknowledge receipt of your letter to me of June 15, 1962, containing the preposterous charge that my action in paying the decedent's funeral bill on behalf of a client who is a first cousin and heir at law of the

decedent "might be termed champertous and a violation of the Canon of Legal Ethics."

For your information, I consider it highly improper for you to have taken it upon yourself to advise the S. H. Hines Company that it should attempt to refuse payment of the decedent's funeral bill on behalf of an heir of the decedent. I call your attention to the fact that you yourself had already recommended to the Court that payment of this bill in the amount of $879.40 be approved as a debt against the Estate and I also call your attention to the fact that Mrs. Marvin is not and has never been a creditor of the Estate.

Even if Mrs. Marvin could be considered a "creditor" by reason of the fact that she alleges that she "personally obligated and guaranteed herself to pay" the decedent's funeral expenses, letters of administration cannot be granted to her because Section 20-216 of the District of Columbia Code expressly limits the granting of administration to a creditor "*If there be no relations, or those entitled decline or refuse to appear and apply for administration.* * * *." Under the circumstances, payment of the funeral bill so as to relieve Mrs. Marvin from any possible liability therefor would seem to be not only proper but desirable, and likewise the undertaker should not have to decline payment at this time.

I have been practicing law in the District of Columbia for more than twenty years, and until your recent letter there has never been any such charge made against me.

Your letter of June 15th indicates that copies of it were sent by you to Shanley, Fisher & Kuykendall, Esquires, and Maude R. Pryse. I therefore ask you to advise them in writing that you were mistaken in your charge against me.

EXHIBIT (2) Page 2

If a copy of your letter to me has been filed in the case, I ask that you take proper steps to have it removed therefrom as soon as possible.

I believe that the above constitutes sufficient explanation of the matter. If the Court feels that further explanation is desirable, I shall be glad to furnish same to the Court.

Enclosed is a copy of my letter of June 15, 1962 to The S. H. Hines Company which is self-explanatory. I ask that you promptly notify The S. H. Hines Company that you had no authority to attempt to compel them to return my check, and, if you made any implication to them, or to anyone else, that my conduct might be improper, I ask that you make immediate retraction.

Sincerely,

DONALD M. SULLIVAN

DMS:bjs
Enclosure

CC: Shanley, Fisher & Kuykendall, Esquires,
1815 H Street, N.W.,
Washington, D. C.

and

Maude R. Pryse,
#2 Dupont Circle, N.W.,
Washington, D. C.

EXHIBIT (3)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
WASHINGTON 1

Chambers of
Edward A. Tamm
Judge

June 21, 1963

To: Judge McGuire

From: Judge Tamm:

Re: Estate of Margaret D. Gage, Deceased, Admin. No. 105,442.

On Tuesday, June 19, 1962, at the request of Mr. Donald M. Sullivan, I held a conference in my chambers. In attendance at this conference, in addition to Mr. Sullivan, were Mr. Theodore Cogswell, Register of Wills, Maude R. Pryse, attorney for Dorothy B. Marvin, and Mr. Harry Tyson Carter, attorney for Helen Durfee Palmer. Mr. Sullivan, Mr. Carter and Maude Pryse are all attorneys representing clients who are petitioning, or cross-petitioning for letters of administration in the above-entitled case.

The conference in my chambers had been requested by Mr. Sullivan for the purpose of requesting that I as Probate Judge remove from the probate file in this estate a letter addressed to Mr. Sullivan by the Register of Wills, Mr. Cogswell. Mr. Cogswell's letter, dated June 15, 1962, is attached hereto, as is Mr. Sullivan's response of June 18, 1962. Mr. Sullivan demanded the removal of Mr. Cogswell's letter and, in addition, charged that Mr. Cogswell and his assistant were biased and prejudiced towards him and that this bias and prejudice was influencing their official conduct in connection with the present case. Mr. Sullivan accused Mr. Cogswell of a "diabolical conspiracy" in this case and in other heated and intemperate

language accused Mr. Cogswell of falsely accusing him of "champertous" conduct and with violation of a Canon of Legal Ethics. Included in Mr. Sullivan's charges against Mr. Cogswell and his office was the claim that Cogswell was usurping authority of the Court and was acting without authority in preparing and sending his letter of June 15th.

Mr. Cogswell took the position that his letter of June 15, 1962 was an effort on his part to determine from his letter and any response made thereto by Mr. Sullivan, what the facts were in this situation in order that he could determine whether the matter was one which he might have to bring to the Court's attention. Mr. Cogswell recited in detail facts and circumstances in this case which prompted him to assume that Mr. Sullivan's action might constitute an effort on the part of Mr. Sullivan to overreach opposing counsel in the contest for letters of administration.

Maude R. Pryse, as attorney for Dorothy B. Marvin and who had originally guaranteed the funeral bill in this case, complained of Mr. Sullivan's conduct in taking action in the case without notifying her as opposing counsel.

EXHIBIT (3) Page 2

Memorandum to Judge McGuire June 21, 1962
Page 2

The resulting discussion developed information concerning some internecine conflict relating to an appraisal of the real property in the estate, during which Mr. Sullivan made a further charge that either Mr. Cogswell or Mr. Burkart had complained to the police concerning Mr. Sullivan's conduct, although Mr. Cogswell denied any such action on the part of his office.

The charges and counter-charges in this situation are of such a serious nature that they seem at this time to obscure

the immediate question of whether Mr. Cogswell's letter should or should not be expunged from the records. If Mr. Sullivan has engaged in improper or unethical conduct, he certainly should be the subject of appropriate administrative action on the part of the Court. On the other hand, if Mr. Cogswell, or members of his staff, have done anything improper in this case, or if their actions have been motivated by any bias or prejudice, the Court again has an administrative problem of a disciplinary nature.

I think, consequently, that in order to proceed upon a sound basis in this situation, this memorandum and its attachments should be referred to the Court's Committee on Grievances for an appropriate investigation, report, and recommendation to the Court upon the conduct of Mr. Sullivan. If the Committee's report indicates improper conduct on the part of Mr. Sullivan, the Court should, of course, take appropriate action against him. If, on the other hand, the report exonerates Mr. Sullivan of any irregularity in this situation, the Court, again, should take proper administrative action.

I have prepared several copies of this memorandum. In the event you concur in the reference of this matter to the Committee on Grievances, I think that both Mr. Cogswell and Mr. Sullivan should be informed of the Court's action and furnished copies of this memorandum for their information.

Respectfully,

/s/ EAT

EXHIBIT (4)

June 21, 1963

MEMORANDUM TO JUDGE TAMM

This will acknowledge receipt of your memorandum of even date with reference to the Estate of Margaret D. Gage, Deceased, Admin. No. 105,442.

Please be advised that the same had been referred to Judge Sirica who is the judge in liaison with the Committee on Admissions and Grievances.

You will remember that liaison has not been abolished as to external agencies, so to speak, of the Court.

/s/ MATTHEW F. MCGUIRE
Chief Judge

EXHIBIT (5)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Chambers of
JUDGE JOHN J. SIRICA

June 28, 1962

MEMORANDUM TO COMMITTEE ON ADMISSIONS & GRIEVANCES:

Enclosed herewith is a memorandum dated June 27, 1962 from Mr. Cogswell to me, a memorandum to Judge Tamm from Chief Judge McGuire dated June 21, 1962, a memorandum to Chief Judge McGuire from Judge Tamm dated June 21, 1962, a letter from Donald M. Sullivan to Mr. Cogswell dated June 18, 1962, and a photostatic copy of Mr. Cogswell's letter to Mr. Sullivan dated June 15, 1962.

This material sets forth in detail the problem arising in connection with the Estate of Margaret D. Gage, deceased, Administration No. 105,442.

It will be appreciated if the Committee will conduct an investigation into this matter and submit their report and recommendation to the Court.

Both Mr. Sullivan and Mr. Cogswell have been advised that this matter has been referred to your Committee.

/s/ JOHN J. SIRICA
John J. Sirica
Liaison Judge

EXHIBIT (6)

DONALD M. SULLIVAN
Attorney at Law
Suite 430, Washington Building
15th & New York Ave., N.W.
Washington 5, D. C.

September 6, 1963.

Committee on Admissions and Grievances,
United States District Court
for the District of Columbia,
Room 6409, United States Court House,
Washington 1, D. C.

Gentlemen:

My counsel have carefully related to me the substance of the conference which was had yesterday with your Committee, supplementing the similar conference of July 30th, having to do with your Committee's suggestion that it would recommend to the Court that the entire matter be dropped if I would submit to your Committee a signed statement to the effect that, while I considered my actions to have been entirely proper, I would, in view of the questions that have been raised, agree to withdraw as counsel for the paternal heirs in the probate cause within thirty days, and would agree that in future cases I would not

jointly represent American Archives Association and heirs under similar circumstances of recommendation by American Archives Association. I am informed that you desire to have my reply by 11:00 A.M. this morning.

After careful consideration of the entire matter I have concluded that I should not agree to sign such a statement, and I believe that your Committee is entitled to know my reasons therefor. Without going into great detail, they are as follows:

1. I understand that you have informed my counsel that your Committee is satisfied as to my good faith in entering upon and conducting the representation of American Archives Association and the paternal heirs, and that the only matters that really give your Committee concern are (a) the circumstances of my employment by the heirs as a result of recommendation made by American Archives Association to the heirs after I had already been employed to represent the assigned interests of American Archives Association; and (b) the possibility of conflict of interest between my client, American Archives Association, on the one hand, and my clients, the paternal heirs, on the other hand.

2. Feeling as I do that Opinion 111 of the Committee on Professional Ethics and Grievances of the American Bar Association fully justifies my acceptance of employment by the paternal heirs, and feeling as I do that the decisions in *Morris* v. *Foster,* 51 App. D. C. 238, and *Kreis* v. *Block,* D. C. Mun. App., 75 A. 2d 523, completely dispose of the conflict of interest proposition, I would be unfair to myself, and would actually be violating Canon 44, if I withdrew from the representation of the paternal heirs. Also, I would be unfair to the many prominent and highly ethical members of the bar who have represented American Archives Association and assigning heirs under identical circumstances.

EXHIBIT (6) Page 2

3. Another factor that has led to my decision is the knowledge that a Committee of the Bar Association of the District of Columbia made a thorough investigation of the procedures of American Archives Association in 1957, making no adverse recommendations as to any phase of the operations of American Archives Association, although the record herein shows that such Committee was informed at that time by American Archives Association of the very procedures which are now being questioned before your Committee. (It was specifically told, among other things, that American Archives Association "retains counsel to represent" American Archives Association, which counsel "also represents the heirs without additional compensation".)

In the light of the above facts, I see no basis for taking any action which might be construed as even an indirect admission of the possibility of improper conduct.

You can rest assured that, if an actual conflict of interest should arise between any of my clients, I would, of course, promptly suggest to the clients the need for separate counsel.

I trust that you will understand and appreciate my position.

Very sincerely,
/s/ Donald M. Sullivan

DMS:bjs

All of the following material is subject to Appellant's Motion to Strike as not properly part of record herein.

[Filed June 5, 1962—Estate of Margaret Delano Gage, Dec'd., Admn. No. 105,442]

Answer of Cross-Petitioner Helen Durfee Palmer to Cross-Petition of Harold Calvin Gage and to Cross-Petition of John Franklin Gage Filed June 5, 1962

1. This cross-petitioner is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs one and three of the cross-petition of Harold Calvin Gage and the cross-petition of John Franklin Gage.

2. This cross-petitioner admits the allegations contained in paragraphs two, four, five, six and seven of the cross-petition of Harold Calvin Gage and the cross-petition of John Franklin Gage.

Affirmative Defense

This cross-petitioner, for reasons why the nominee of cross-petitioner Harold Calvin Gage, or the nominee of John Franklin Gage, or John Franklin Gage himself, should not be appointed, represents:

1. That this cross-petitioner is informed and believes that an undisclosed party-in-interest, the American Archives Association, is the true party behind the cross-petition of said Harold Calvin Gage and the cross-petition of said John Franklin Gage. That said American Archives Association is a Delaware Corporation qualified to do business in the District of Columbia with an office in the Washington Building, 15th and New York Avenue, Northwest, Washington 6, D. C.

2. That this cross-petitioner is informed and believes that said corporation exists principally for the purpose of acquiring assignments of interests in the estates of persons dying intestate.

3. That this cross-petitioner is informed and believes that said corporation acquires such interests by persuading

persons believed by it to be heirs-at-law and next of kin to execute assignments-in-blank of interests to which they may be entitled in the assets of persons dying intestate, such assignments being made without the name of the deceased intestate being revealed to the assignor.

4. That this cross-petitioner is informed and believes that neither the proportion of interest thus assigned nor the actual proceeds to the American Archives Association resulting therefrom bear, other than accidentally, any relation to services actually performed or purported to be performed by American Archives Association.

5. That in the month of April, 1962, this cross-petitioner was approached by a person she believes to have been a duly authorized agent of the American Archives Association for the purpose of procuring from this cross-petitioner an assignment of two-fifths of the interest of cross-petitioner in the estate of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent.

6. That the inducement offered this cross-petitioner to execute an assignment-in-blank of a two-fifths interest in an unnamed estate was the promise to reveal the name of a deceased person in whose estate this cross-petitioner purportedly had an interest, said decedent being, in fact, Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage) the above-named decedent. A true copy of said Agreement and Assignment is attached hereto marked Exhibit A and is made a part of this Answer by this reference.

7. That this cross-petitioner is informed and believes that had she executed said assignment-in-blank she would have been told of the death of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the

above-named decedent, on the execution of a supplementary document authorizing the American Archives Association to insert in the previously executed Agreement and Assignment-in-blank the full name of the decedent. A true copy of said supplementary document is attached hereto marked Exhibit B and is made a part of this Answer by this reference.

8. That cross-petitioner refused to execute said Assignment and subsequently petitioned for letters of administration on the estate of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent.

9. That this cross-petitioner is informed and believes that her sister, Mary Elizabeth Durfee, who is also a first cousin of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent, was also approached in the manner alleged in paragraphs five through seven above.

10. That said Mary Elizabeth Durfee also refused to execute such an assignment.

11. That this cross-petitioner is informed and believes that cross-petitioner Harold Calvin Gage was approached by the American Archives Association in the manner alleged in paragraphs five through seven above.

12. That this cross-petitioner is informed and believes that said cross-petitioner Harold Calvin Gage did execute an Agreement and Assignment and supplementary document substantially in the form of those annexed in Exhibits A and B hereto.

13. That this cross-petitioner is informed and believes that cross-petitioner John Franklin Gage was approached by the American Archives Association in the manner alleged in paragraphs five through seven above.

14. That this cross-petitioner is informed and believes that said cross-petitioner John Franklin Gage did execute an Agreement and Assignment and supplementary document substantially in the form of those annexed in Exhibits A and B hereto.

15. That this cross-petitioner is informed and believes that all alleged first cousins of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent, listed in the cross-petition of Harold Calvin Gage and the cross-petition of John Franklin Gage were approached by American Archives Association in the manner alleged in paragraphs five through seven above.

16. That this cross-petitioner is informed and believes that all alleged first cousins of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent, listed in the cross-petition of Harold Calvin Gage and in the cross-petition of John Franklin Gage did execute an Agreement and Assignment substantially in the form of that annexed in Exhibit A hereto.

17. That this cross-petitioner is informed and believes that as a result of the assignments secured in blank by the American Archives Association as alleged in paragraphs twelve, fourteen and sixteen, the said American Archives Association is a major undisclosed party-in-interest behind the cross-petition of Harold Calvin Gage and the cross-petition of John Franklin Gage.

18. That this cross-petitioner is informed and believes that absent the undisclosed interest of the American Archives Association in the estate of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy

Gage), the above-named decedent, the cross-petition of Harold Calvin Gage for the grant to The National Bank of Washington of letters of administration of said estate would not have been filed.

19. That this cross-petitioner is informed and believes that absent the undisclosed interest of the American Archives Association in the estate of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent, the cross-petition of John Franklin Gage for the grant to The National Bank of Washington, or alternatively, to himself, of letters of administration of said estate would not have been filed.

20. That this cross-petitioner is informed and believes that absent the cross-petitions of Harold Calvin Gage and John Franklin Gage, or cross-petitions of other alleged heirs-at-law and next of kin of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent, who had executed assignments of interests to the American Archives Association, no petition praying the grant to The National Bank of Washington of letters of administration of said estate would have been filed.

21. That this cross-petitioner is informed and believes that should letters of administration of the estate of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent, issue to John Franklin Gage, the true party guiding administration of said estate would be the American Archives Association, the undisclosed interest of which in said estate being many times greater than the interest of said cross-petitioner, John Franklin Gage.

22. That this cross-petitioner is informed and believes that the policy established in Title 20 of the District of

Columbia Code and, more specifically, the policy established by the statutory preferences in the granting of letters of administration by Sections 204 through 216 of said Title 20 of the District of Columbia Code, requires rejection of the cross-petition of Harold Calvin Gage and the cross-petition of John Franklin Gage as necessarily being in practical effect the cross-petitions of the undisclosed party-in-interest, the American Archives Association, which corporation has no standing to petition for letters of administration in this case, nor, *a fortiori,* any preferred rights thereto.

23. That this cross-petitioner is informed and believes that public policy and proper judicial administration of the affairs of intestates require that no exercise of judicial discretion as to the grant of letters of administration be such as to encourage and promote the activities of the said American Archives Association whereby said corporation avoids the statutory and judicial control over fees awarded for performing a normal and usual function of administrators, i.e., the location of and notification to heirs-at-law and next of kin.

24. That this cross-petitioner is informed and believes that to grant the prayer of cross-petitioner Harold Calvin Gage for the grant to The National Bank of Washington of letters of administration of the estate of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage) the above named decedent, or to grant the prayer of cross-petitioner John Franklin Gage for the grant to The National Bank of Washington or to himself of letters of administration of said estate, would encourage and promote the activities of said American Archives Association and like organizations, if any.

25. That this cross-petitioner is informed and believes that, under the circumstances hereinbefore alleged, to grant letters of administration herein to The National Bank of

Washington or to any of the alleged heirs-at-law and next of kin of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent, who have assigned interests in said estate to the American Archives Association would necessarily place such administrator in a situation where said administrator's inclination and obligation to serve the interests of the American Archives Association would conflict with the requirements of impartial administration of said estate.

26. That this cross-petitioner is informed and believes that she is entitled to letters of administration on the estate of Margaret Delano Gage (also known as Margaret Louise Vassar Gage, Margaret Vivian St. John Gage and Margaret Vivian de Lannoy Gage), the above-named decedent, after disqualification of cross-petitioner John Franklin Gage and any other heirs-at-law and next of kin who have assigned substantial shares of their interest in said estate to the American Archives Association; and that she has filed in this Court her cross-petition to be appointed administratrix of said estate.

WHEREFORE, the premises considered, cross-petitioner prays:

1. That this contest and the cross-petition of this cross-petitioner be heard together.

2. That the cross-petition of cross-petitioner Harold Calvin Gage for the grant to The National Bank of Washington of letters of administration be dismissed.

3. That the cross-petition of cross-petitioner John Franklin Gage for the grant to The National Bank of Washington or to himself of letters of administration be dismissed.

4. That letters of administration issue to this cross-petitioner.

5. That the Court grant such other and further relief as to the Court may seem just and proper.

/s/ Helen Durfee Palmer
Cross-Petitioner
59 Dayton Crescent
Bernardsville, New Jersey

Shanley, Fisher & Kuykendall
Attorney for Cross-Petitioner

/s/ Harry Tyson Carter
1815 H Street, Northwest
Washington 6, D. C.
(EXecutive 3-8250)

(Verified May 29, 1962)

(Certificate of Service)

[Filed June 5, 1962 as Exhibit A to Answer of Cross-Petitioner Helen Durfee Palmer—Estate of Margaret Delano Gage, Dec'd., Admn. No. 105,442]

AGREEMENT AND ASSIGNMENT

In the Matter of the Estate of

.....

For and in consideration of American Archives Association, or its agent, having revealed to me the fact that there is a fund of money or other assets which may be due me from the above entitled estate, or source, as well as in further consideration of its time, effort and expense in investigating and endeavoring to procure proof of relationship and interest therein, I do hereby agree to and by these presents do hereby grant, bargain, sell, convey, transfer, set over and assign unto the said American Archives Association an undivided two-fifths (2/5) ..... of all my right, title and interest in and to said fund of money, property, real or personal, joint bank account, insurance or other assets left by said deceased, and in any claims arising directly or indirectly out of the death

of said deceased, or other assets awarded to me therefrom. I shall not be liable for expenses incurred by American Archives Association in investigating and procuring proof of my relationship.

All of the above shall be binding upon my executors, administrators, heirs and assigns.

WITNESS my hand and seal this .... day of ....., 19.....

WITNESSED BY:

.... (L. S.)
.... (L. S.)
.... (L. S.)

.....)
) ss:
.....)

On this ..... day of ....., 19...., before me, a Notary Public in and for the County and State aforesaid, personally appeared ..... known to me to be the person whose name is subscribed to the within instrument, and ..... duly acknowledged to me that.... he executed the same, and the said person being by me first duly sworn, did severally declare that....he executed said instrument of.... h....free will, act and deed, with full knowledge of all the contents thereof and as for the objects and purposes therein stated.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day, month and year in this certificate first above written.

.....
Notary Public in and for the
County of .....
and state of .....
My Commission expires .....

[Filed June 5, 1962 as Exhibit B to Answer of Cross-Petitioner Helen Durfee Palmer—Estate of Margaret Delano Gage, Dec'd., Admn. No. 105,442]

It is understood that American Archives Association has not received complete cooperation in the matter of the estate in question, referred to in the Agreement and Assignment that I executed on the ..... day of ....., 19...., and for this reason, the full name of the decedent was not disclosed. Therefore, I hereby authorize American Archives Association to insert in the aforementioned Agreement and Assignment, the full name of the decedent, at such time as full cooperation is secured, or at its election.
Signed at .....
this ..... day of ....., 19.....

.....
.....
WITNESSED by: .....
....
....

[Filed July 22, 1963—Estate of Margaret Delano Gage, Dec'd., Admn. No. 105,442]

Memorandum of Judge McGarraghy

This case is before the Court on remand by the United States Court of Appeals for the District of Columbia for further proceedings consistent with the Opinion of that Court in the case of *John Franklin Gage, et al,* Appellants, v. *The Riggs National Bank of Washington, D. C.,* Administrator, Estate of Margaret Delano Gage, deceased, Appellee No. 17,309, said appeal being taken from an Order of this Court appointing The Riggs National Bank as Administrator of the estate.

The original proceedings involved a contest for appointment of administrator by fourteen first cousins, all in the same degree of relationship, but consisting of two classes, one of twelve paternal first cousins, male and female, and the other of two female maternal first cousins. Authentic-

ity of relationship was not contested. The Court of Appeals was of the opinion that, in selecting The Riggs National Bank as a disinterested third party administrator instead of naming one of the cousins, the Court had not set forth explicitly and with particularity its reasons for doing so in view of the statutory provisions set forth under D. C. Code 20-201 to 20-218 and the system of priorities as between the next of kin, to-wit, the preference of males over females in equal degree (20-209) and the preference of relations on the part of the father over those on the part of the mother in equal degree (20-214).

In the original proceedings in this Court on May 18, 1962, Harold Calvin Gage, one of the paternal cousins, filed a cross-petition for letters of administration to a petition filed by a creditor, and in that cross-petition Mr. Gage prayed that letters of administration be granted to the National Bank of Washington. He attached to his petition consents and requests that the Court appoint the National Bank of Washington as Administrator of the estate and that letters of administration be granted to the said National Bank of Washington, said consents being signed by all of the paternal first cousins of the decedent. At the same time, there was also filed a consent of National Bank of Washington to serve as administrator if appointed.

On the following day, a cross-petition was filed by Helen Durfee Palmer, one of the maternal first cousins of the decedent requesting that letters of administration be granted to her and Mary Elizabeth Durfee, the other maternal first cousin, filed a consent to that appointment.

On May 23, 1962, the said paternal first cousins filed additional papers consenting to and requesting appointments of the National Bank of Washington as Administrator of the estate, but reciting that if the Court should not appoint that bank as Administrator, they consented to and requested the appointment of John Franklin Gage.

Various other pleadings were filed in the cause which, for the purpose of this opinion, it is not necessary to relate

in detail, but after full consideration thereof, the Court determined that the best interest of the estate required that a disinterested party be appointed, and the Court appointed The Riggs National Bank of Washington, D. C. as Administrator. The Court observed that the deceased maintained an account in this bank and would probably have selected this institution over other financial institutions. The petitioning creditor and the cross-petitioning maternal first cousins consented to the appointment of The Riggs National Bank. It was from this appointment that an appeal was taken by the paternal first cousins to the United States Court of Appeals for the District of Columbia, with the resulting remand as indicated above.

Substantially the same parties are now before this Court on remand from the United States Court of Appeals. Since the commencement of this proceeding, two of the paternal first cousins, one a petitioner (Harold Calvin Gage), have died, but their deaths will not affect the results. Further pleadings have also been filed which have been given consideration. One Lucius P. Dolliff, a first cousin once removed (son of a deceased paternal first cousin) who is represented by the same counsel who represents John Franklin Gage and has the same relationship to American Archives Association has filed petition for his own appointment, but he is representative of his mother, a deceased next of kin, who filed her consent to the appointment of National Bank of Washington and, for the reasons hereinafter stated, renounced her right to appointment. In any event, the Court finds that the best interest of this estate would not be served by his appointment. The National Bank of Washington, which was first nominated by the paternal first cousins, has withdrawn its name from consideration. John Franklin Gage, one of the paternal first cousins who originally asked for the appointment of the National Bank of Washington, has now, by amended petition, asked only for his own appointment.

The Court is required to determine the legal effect of the pleadings first filed herein by the paternal first cousins in which they consented to and requested that the Court appoint National Bank of Washington as Administrator of the estate. Did this action by the paternal first cousins constitute a renunciation of their preferential rights under the provisions of the District of Columbia Code, and was that renunciation irrevocable so that they could not later come in and claim the appointment for one of their class, and should this Court proceed under the provisions of 20-218 of the District of Columbia Code to make appointment as if such persons were not entitled?

Sec. 20-218 of the Code provides that "If any person entitled to administration shall, in writing, decline the same, the Court shall proceed as if such persons were not entitled." A long line of Maryland decisions construing a substantially identical provision of the Maryland law supports the view that the consents so filed by the paternal first cousins did constitute an irrevocable renunciation of their right to appointment. See *Carpenter* v. *Jones,* et al., 44 Md. 625, *Lutz* v. *Mahan,* 80 Md. 233, 30 A. 645, *Jones* v. *Harbaugh,* 93 Md. 269, 48 A. 827, *Slay* v. *Beck,* 107 Md. 357, 68 A. 573, and *Sullivan* v. *Doyle,* 193 Md. 421, 67 A. (2d) 246.

Having in mind that there are no District of Columbia decisions in point and applying the principles of law stated by the United States Court of Appeals for the District of Columbia in the case of Watkins v. Rives, 75 U.S. App. D.C. 109, the Court is of the opinion that this Court should follow the Courts of Maryland in their interpretation of a substantially identical section of the Code and should hold that *there was an irrevocable renunciation of the rights of these paternal first cousins.*

In view of the renunciation by the paternal first cousins, the maternal first cousins would be entitled, but they have

indicated that they would not object to the appointment of the Riggs National Bank as a disinterested third party.

The Court is next concerned with the extent of its power of discretion in considering the appointment of either of the two classes of cousins, in view of the language of the Code to the effect that such appointments are subject to the discretion of the Court.

In the instant case on appeal, the Court of Appeals said:

> "This Court, however, has also said that, in an appropriate case and for sound reasons, discretion may be exercised to select an administrator from among lesser preferred classes of next of kin."

The Court further in its opinion said:

> "For the discretion to attach, however, the conditions of the statute must have been satisfied. Since there were relations in being in the persons of the two groups of cousins, the appointment of an outsider turned upon the question of whether there had been such declination within the perview of the statute."

Having found that there was a declination, the Court is of the firm opinion that the appointment of an outsider is required for the orderly administration of this estate and the protection of the rights of all parties in interest.

The Court has given careful consideration to the entire record, as well as the circumstances surrounding the various petitions and other pleadings filed on behalf of the paternal first cousins in this case. Although the Gage cross-petition for administration originally filed in this case was ostensibly filed on behalf of the petitioner by his own counsel, the fact is that, without any disclosure to the Court, counsel actually represented not only the petitioner and the other paternal first cousins, but primarily was representing an association known as the American Ar-

chives Association which originally retained said counsel and arranged for his compensation.

In relation to this estate, Archives acquired from each of the paternal first cousins assignments in blank whereby said paternal first cousins assigned a forty percent interest of whatever might be their share of decedent's estate to Archives. In return for this assignment, Archives promised to prosecute their claims at no expense to them. In this case it is represented that the estate of the decedent is worth at least $200,000.00 and, if this is so, the claim of Archives, which was undisclosed to the Court, against the distributive share of the twelve paternal heirs, would amount to approximately $70,000.00, or almost five times the share of any one of the claimants, but the Court was not informed of the Archives organization nor of its sizable interest in the estate, nor was the Court informed that the attorney of record for the cross-petitioner Gage was, in fact, also representing Archives which is not a party to the proceeding and is not subject to the jurisdiction of the Court.

The original petition filed by the attorney for the cross-petitioner Gage who had been retained by Archives did not list the two maternal first cousins of the decedent but listed only the twelve paternal first cousins although it is reasonable to conclude that Archives and its attorney knew full well the names and relationships of the two maternal first cousins.

It seems clear that Archives actually controls this litigation in behalf of the paternal first cousins as evidenced by the fact that the Court now has before it an amended cross-petition of John Franklin Gage filed July 10, 1963, for his appointment, and the cross-petition of Lucius P. Dolliff for his appointment, both amended cross-petition of Gage and cross-petition of Dolliff being filed the same day by the same counsel who is the retained counsel of

Archives, and to which in turn said counsel is looking for his total compensation.

During the course of this hearing counsel for Gage conceded that he will be compensated by Archives for all services rendered by him both to Archives and to Gage as administrator should Gage be appointed to that office. There exists, therefore, a serious possibility of such conflict of interest as would be inimicable to the orderly and proper administration of the estate.

A serious question exists with respect to the validity of the agreements between Archives and the twelve paternal first cousins in the light of the decision of the Court of Appeals in *Merlaud* v. *National Metropolitan Bank of Washington, D. C., et al.,* 65 U.S. App. D.C. 385, et seq. This Court is not called upon at this stage to pass upon the validity of those contracts and, is therefore, not doing so, but it seems reasonable to anticipate that the legality of those contracts may well be brought into question at some future stage of this administration. Should this happen, and should petitioner Gage be appointed administrator of the estate with counsel for Archives also serving as counsel for the administrator, objective consideration of this question by the administrator and his counsel would be extremely difficult, since the administrator would be in the position of having received his appointment through the efforts of Archives and his counsel is looking to Archives for his total compensation.

For the foregoing reasons, the Court is of the opinion that in the exercise of discretion vested in it under the circumstances of this case, the Court should appoint a disinterested third party to serve as administrator.

The logical designation is that of The Riggs National Bank of Washington, D. C., which was originally named herein and has been serving under that appointment and which was one of the banks in which the decedent carried

a banking account. While the Court of Appeals vacated the original appointment of Riggs, the Order did not find that the bank was disqualified, but merely vacated the appointment so that further proceedings could be had pursuant to the opinion of the Court. Such further proceedings now have been had with the conclusions reached as above stated, and the Court will sign an Order reappointing The Riggs National Bank of Washington, D. C., as Administrator.

This memorandum will be considered as the Court's Findings of Fact and Conclusions of Law.

Counsel will submit an Order in accordance with the foregoing through the office of the Register of Wills.

/s/ Joseph C. McGarraghy
Judge

July 22, 1963

[Filed January 30, 1964—Estate of Margaret Delano Gage, Dec'd., Admn. No. 105,442]

Memorandum of Judge McGarraghy

The Riggs National Bank of Washington, D. C. as Administrator under its original appointment, on August 30, 1963 filed what it denominated its First Account which, in fact, was its First and Final Account under its original appointment which had theretofore been vacated by Order of the United States Court of Appeals for the District of Columbia Circuit. Said account included an item of fee for legal services to the law firm of Shanley, Fisher & Kuykendall, and reimbursement of out-of-pocket expenses in the total amount of $6,191.91, and a commission to the Administrator of 5% of $5,879.68 amounting to $293.98.

Thereafter, on October 22, 1963, John Franklin Gage, et al, by their attorney, filed exceptions to the account, followed by memorandum and argument on behalf of exceptants and counsel for the Administrator filed reply memorandum.

Following the filing of the exceptions, counsel for the exceptants took the deposition of counsel for the Administrator on November 1, 1963, December 10 and 11, 1963. Thereafter, as a consequence of motions incident to the deposition, the Court took testimony in open court on January 2, 7, 8, and 9, 1964.

The Court has carefully considered the entire record in this case, including all of the foregoing, as well as memorandum and argument on behalf of exceptants and memorandum on behalf of the Administrator filed at the conclusion of the hearing in open court.

The Court is of the opinion that the exceptions in question are without merit; that they are not supported by any substantial evidence; that they are not taken in good faith, and are frivolous.

With respect to the fee for legal services and reimbursement of out-of-pocket expenses, the Court is of the opinion that the fee is in all respects reasonable and proper, taking into consideration the nature of the services rendered, and it has substantial support in the record.

With respect to the claimed commission to the Administrator, the Court is of the opinion that, since this is in fact a final account by the Riggs National Bank under its original appointment, the allowance of a commission at this time is appropriate and should be approved in the amount claimed.

Accordingly, the exceptions to the account will be overruled and the fee, reimbursement and commission as claimed will be approved.

Counsel for the Administrator will submit an appropriate Order.

/s/ Joseph C. McGarraghy
Joseph C. McGarraghy
Judge

January 30, 1964

[Excerpt from Transcript of Hearing of July 17, 1963 on remand—Estate of Margaret Delano Gage, Dec'd., Admn. No. 105,442]

56 Mr. Sullivan: * * * On Mr. Carter's point that the maternal cousins should be appointed under the theory that there is sound reason to pass over the paternal cousins. I submit that in the first place, the Court of Appeals was aware of the allegations that were contained in the record, and did not see fit to suggest to this Court that it pursue those further as possible sound reason for appointing someone other than the paternal cousins. If the Court of Appeals had felt that there was something there which would constitute sound reason, it certainly would have suggested to this Court that it pursue that avenue also, as well as the avenue that they did.

The Court: Let me ask you a question or so about this organization, the American Archives Association.

I am not sure whether I found it in the pleadings. It may be that I read it—I think the American Archives Association advertises in the Law Reporter, doesn't it, from time to time?

Mr. Sullivan: That is correct, Your Honor.

The Court: I think that they say that their services are without cost to the estate, or words to that effect. Isn't that what they say?

Mr. Sullivan: Yes, Your Honor.

The Court: They make their agreement with the
57 heirs, who agree to pay them forty per cent or whatever it may be of the amount recovered from the estate by those heirs, is that correct?

Mr. Sullivan: Yes, Your Honor.

The Court: In this case, you do represent the American Archives Association?

Mr. Sullivan: That is correct, Your Honor.

The Court: You have a fee agreement with them?

Mr. Sullivan: I have a fee agreement with American Archives Association.

The Court: And then if Mr. John Franklin Gage should be appointed as administrator, you would represent him as administrator, would you not?

Mr. Sullivan: If necessary, Your Honor, I would. I do not deem it essential. If I did represent him as administrator, I would not claim a fee from the estate as counsel for the administrator.

The Court: That was the next question I was getting to. Would you be entitled to compensation as attorney for the estate as well as compensation from American Archives Association out of—which I assume they pay you from—this forty per cent?

Mr. Sullivan: Well, as to the question of whether I would be entitled, I don't know. I would state to Your Honor that I would not accept or ask for compensation.

58 The Court: You would not claim compensation from the estate.

Mr. Sullivan: No, Your Honor.

Before I leave the proposition of sound reason to depart from the statutory preferences, while I still contend that this is an item that the Court of Appeals did not contemplate this Court getting into, I should state that the Court of Appeals decisions are clear as to what sort of a reason constitutes a sound reason for departing from the statutory preferences.

In the case of Dial v. Johnson, 104 U.S. Appeals D.C. Page 32, decided in 1958, the Court of Appeals recognized that in a proper case a probate court has discretion to depart from the statutory preferences providing that there is sound reason for doing so.

Inthe case of Dial v. Johnson, the reasons which the Court indicated might be considered sound were: One, an allegation that the person who was appointed administrator had exercised fraud in procuring the consent of the decedent's husband to the appointment of that person as administrator. • • •

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,732

DONALD M. SULLIVAN, *Appellant,*

v.

THE COMMITTEE ON ADMISSIONS AND GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Appellee.*

Appeal From a Judgment of the United States District Court for the District of Columbia

JOSEPH A. FANELLI
1001 Connecticut Avenue, N. W.
Washington, D. C.
Attorney for Appellant

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

STATEMENT OF QUESTIONS PRESENTED

1. Was there evidence before the court below to support findings that appellant, an attorney, who represented the heirs to an estate and also represented the assignee of part of their interests in the estate, participated in a relationship which: (1) partakes of the nature of champerty; (2) amounts to solicitation of professional employment; (3) permits the intervention of a lay agency between attorney and client; (4) foments litigation; and (5) intrudes upon the duty requiring counsel to use his best efforts to restrain and prevent the client from doing those things which the lawyer himself ought not to do?

2. Where the court below in a disciplinary proceeding has correctly dismissed the charges against an attorney, but has erroneously included in its judgment, as grounds therefor, findings that are unsupported by the stipulated essential facts upon which an agreed case was submitted to the court below, which findings are seriously injurious to the good name and reputation of the attorney and prejudice his means of earning his living as a professional man, may this Court direct reformation of the judgment to eliminate such injurious and prejudicial matter?

3. Is the attorney without standing to appeal in such a case, and thus precluded from showing such findings to be unwarranted by the law or the evidence, and from having them deleted, merely because the judgment which incorporated them ended with a formal dismissal in his favor?

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

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AUTHORITIES CITED

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* Authorities chiefly relied upon are marked by asterisks.

STATUTES INVOLVED

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,732

DONALD M. SULLIVAN, *Appellant,*

v.

THE COMMITTEE ON ADMISSIONS AND GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Appellee.*

Appeal From a Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a portion of a final judgment of the United States District Court for the District of Columbia entered on the 21st day of June, 1965, in Misc. No. 1-64.

Notice of Appeal, designating the portion of the judgment to be the subject of the appeal, was filed on July 21, 1965 (JA 22).

Jurisdiction of this Court is founded on Sec. 1291 of Title 28 of the United States Code. The lower Court's jurisdiction is founded on Section 11-1301 et seq. of the District of Columbia Code (1961 Edition).

STATEMENT OF THE CASE

This is an appeal by Donald M. Sullivan, herein called "Sullivan", from part of a judgment of the District Court. That judgment, made upon submission of the case on a stipulated set of facts, dismissed contested charges of misconduct filed against Sullivan, an attorney, by Appellee, the District Court's Committee on Admissions and Grievances, herein called "the Committee" (JA 2, 12, 21).

However, the District Court's judgment of dismissal included by express reference the Findings of Fact and Conclusions of Law set forth in its Memorandum Opinion (JA 19, 21). The Memorandum Opinion finds and holds explicitly that Sullivan, who represented heirs to an estate and also represented the assignee of part of the heirs' interests in the estate, participated in a "relationship" which: (1) "partakes of the nature of champerty"; (2) "amounts to the solicitation of professional employment"; (3) "permits the intervention of a lay agency between attorney and client"; (4) "foments litigation"; and (5) "intrudes upon the duty requiring counsel to use his best efforts to restrain and prevent the client from doing those things which the lawyer himself ought not to do" (JA 20).

After thus in effect censuring Sullivan on five different counts, the Court below went on to say that it was "not disposed . . . to enter any formal order of censure against [Sullivan] while others similarly situated remain untouched in the wings because the question has hitherto not been formally raised" (JA 20). The Court then concluded its Memorandum Opinion by ordering dismissal of the charges against Sullivan with the recommendation that the full District Court adopt a rule "in matters of this

kind" for "monitorial guidance to the Bar and implemental and administrative direction to the Register of Wills" (JA 21).

Sullivan in his answer (JA 6-11) denied all of the charges in the Complaint.

Thereafter an agreed case was submitted by the parties, in which they stipulated all of the essential facts, and this constituted all of the evidence before the court. We quote the stipulation in full:

> It is hereby stipulated and agreed by and between counsel for the Respondent, Donald M. Sullivan, Esquire, and counsel for the Committee on Admissions and Grievances of the United States District Court for the District of Columbia, as follows:
>
> 1. That about the middle of April, 1962, the Respondent was retained by the American Archives Association to represent its interests under assignments which it had secured from non-resident and previously unknown heirs of Margaret Delano Gage, deceased. Copy of the assignment form used, entitled "Agreement and Assignment", whereby the heir assigned to American Archives Association two-fifths of the property of the decedent to which such heir was entitled, is attached hereto and made a part hereof as Exhibit "A".
>
> 2. Shortly after Respondent's employment by American Archives Association, Respondent was asked by American Archives Association if he had any objection to its acquainting its assignors with the fact that Respondent was representing the interest of American Archives Association or to its telling such assignors that if any of them should desire to avail themselves of Respondent's services in the matter, Respondent would be willing to represent them also and without charge. Respondent stated to American Archives Association that he had no objection to its so doing. Thereafter, the Association wrote to each of its assignors (being 12 of the 14 heirs at law and next of kin of the decedent) so advising them. See copy of

letter of April 24, 1962, attached hereto as Exhibit "B", and particularly paragraphs 4 and 5 thereof.

3. A form of authorization (Exhibit "C" attached hereto) was transmitted by American Archives Association to each of its assignors with the said Exhibit "B", by which such heir, if he chose to do so, could authorize the Respondent to represent him in the collection of his share of the estate. All twelve of the heirs from whom American Archives Association had received assignments did sign such authorizations and Respondent undertook their representation also. At the time Respondent undertook to represent the heirs, each heir knew that Respondent also represented the interest of American Archives Association (See Exhibits "B" and "C").

4. At the time of his retainer by the American Archives Association, the Respondent knew that in similar cases, for many years, and right up to the time of his retainer in the Gage matter, other reputable attorneys practicing in the District of Columbia, known personally to him, had represented and been retained by both the American Archives Association and the heirs who had made assignments of portions of their interests to it.

5. Respondent undertook his representation of the American Archives Association and the heirs in good faith. After the Respondent was advised by the Grievance Subcommittee that it questioned whether Respondent's representation of American Archives Association and the paternal heirs was in conformity with the canons of ethics as to solicitation and as to conflict of interest, Respondent continued to represent the paternal heirs and the American Archives Association. Respondent advised the Grievance Subcommittee as to his reasons for so continuing, and that according to his understanding of the law in this jurisdiction there was no conflict of interest and no solicitation; that if a conflict should arise he would promptly suggest to his clients the need for separate representation; and because of his understanding of his duties and obligations to his clients he did not feel that he could or should withdraw.

6. Respondent expressly reserves all procedural objections heretofore made by him herein.

7. Subject to the approval of the Court, this cause is hereby submitted to the Court for decision upon this stipulation of the essential facts.[1]

We summarize the three exhibits to the stipulation.[2] Exhibit A is the "Agreement and Assignment" whereby each of twelve non-resident and previously unknown heirs to the estate assigned two-fifths of his interest therein to the American Archives Association (herein called "American Archives"). Recited as consideration for such assignment by the heir to American Archives are: (1) the revelation to the heir that he might be entitled to a share of the estate, and (2) the time, effort and expense incurred by American Archives in investigating and procuring proof of the relationship and interest of the heir in the estate. It was expressly provided that the heir was not liable for expenses incurred by American Archives in investigating and procuring proof of the heir's relationship. There was no undertaking by American Archives to prosecute the claims of the heirs or to bear the costs of any litigation. (JA 15).

Subsequent to his being retained by American Archives to represent its interests under the assignments, Sullivan, upon inquiry by American Archives, stated he had no objection to the assignor-heirs being told by American Archives of his representation of the assigned interests of American Archives, and of his willingness also to represent, without charge, any of such heirs who might desire his services in the Gage Estate.

---

1 The stipulation was signed for Sullivan by his counsel, Messrs. H. Mason Welch, Justin L. Edgerton, and Andrew A. Lipscomb, and for the Committee by its counsel, Messrs. Edmund L. Jones, Francis W. Hill, and Roger Robb (JA 14).

2 They are printed in full beginning at JA 15.

Exhibit B is a form of letter written by American Archives to each of the twelve assigning heirs telling them that Sullivan had been engaged to protect the assigned interest of American Archives in the estate, and telling them that Sullivan was willing to serve as attorney for them as well, and that he would look to American Archives alone for his compensation (JA 17). The letter (Exhibit B) also informed the heir of the fact that it had been alleged in the estate proceeding that the decedent had died without heirs and that the District of Columbia had filed claim to the estate on the ground that the estate should escheat to the District of Columbia for lack of heirs. A simple form of authorization for Sullivan's representation of the heir (Exhibit C) was enclosed.

Exhibit C, the aforesaid authorization, was addressed by the heir to Sullivan, and reads in full (JA 18-19) as follows:

> I am informed, and believe, that I am entitled to share in the Estate of Margaret Delano Gage.
>
> I, therefore, authorize you to enter an appearance for me and to represent me in the collection of my share of this estate. I understand you also represent the interest of American Archives Association and that you will look to it alone for your fee in this matter.

An agreed case having been submitted to the District Court on the Stipulation of essential facts and attached exhibits, and this being all of the evidence before the District Court, it properly dismissed the charges against Sullivan, but, unfortunately, did not stop there. It went on to make the adverse findings quoted above, and to incorporate them in its final judgment. This action of the lower court amounted to a censure of Sullivan, and constitutes, as we urge here, reversible error. Aggrieved by the resulting injury to his livelihood and the professional reputation he has earned in over twenty-three years

as a member of the Bar of the District Court and this Court, Sullivan has appealed to this Court for redress. He asks for reversal with elimination of the erroneous findings made against him, and correction of the judgment below in exercise of this Court's supervisory power.

The Committee moved in this Court for dismissal of Sullivan's appeal, contending he "has no standing to pursue an appeal from the judgment of the District Court which granted [him] full relief, and in no way impaired his legal rights." The Committee's motion was denied without prejudice to its renewal at hearing on the merits. We brief the merits, as well as the question of Sullivan's standing to pursue this appeal.

STATEMENT OF POINTS

1. None of the District Court's findings against appellant finds support in the facts or the law.

2. Appellant was entitled to a dismissal exonerating him from any charges of professional misconduct.

3. The appellant has standing to appeal because the District Court gave him less than the full relief to which he was entitled, namely, a dismissal exonerating him from any charges of professional misconduct; and because he was and will continue to be seriously prejudiced and injured by the judgment as it stands, and he should not be foreclosed from removing such a blot from his record.

SUMMARY OF ARGUMENT

I. On the Merits

1. Under the law of the District of Columbia, and of most (if not all) jurisdictions in this country, champerty consists of an undertaking—by a person with no previous interest in a suit—to maintain or prosecute litigation for a contingent fee or share in its proceeds and to bear the costs of the litigation. It has never been contended that Sullivan had a contingent fee arrangement or that he

undertook to bear the costs of litigation, nor did he. As to American Archives, the agreed facts show: (a) that American Archives did not undertake to bear the costs of any litigation, (b) that it did not undertake to maintain or prosecute any litigation, and (c) that it had an interest in the matter by assignments based on legitimate past considerations.

2. The agreed facts show that Sullivan was retained by American Archives to represent its interests under assignments it had previously obtained from previously unknown, nonresident Gage heirs sought and found by American Archives in the course of its business of finding unknown or missing heirs, the estate in question being one in which a petition for letters of administration had been filed alleging that the decedent had died without known heirs, and in which a claim was filed by the District of Columbia alleging that the decedent had died without heirs and that the estate was subject to escheat to the District. American Archives did not seek out the heirs as agents of Sullivan or by any prearrangement with him. Sullivan, himself, sought out no one. There is no basis whatever for the finding of fomenting litigation.

3. Sullivan did not permit American Archives to intervene in his representation of the heirs; nor did he permit American Archives to improperly solicit clients for him. Points 4 and 5, below. Sullivan was under no duty to prevent American Archives from seeking out the heirs and could not have prevented that action by American Archives which took place before his retention by American Archives. He was under no duty to decline representation of American Archives, for American Archives was entitled to counsel in protection of its assignee interests, even if their legality had been questionable, which they were not.

4. In reason, custom, and in all the authorities, it did not constitute improper solicitation for Sullivan to permit

American Archives, a client, to inform the heirs, from whom it had obtained assignments, of his willingness to represent them also, without charge, especially since there was a clear community of interest between American Archives and the assigning heirs in the same matter.

5. Sullivan did not permit any intervention of American Archives between him and the heirs. American Archives was not empowered by the heirs to select and retain counsel for them. There is no evidence that Sullivan, freely chosen by each heir, had anything but a personal relationship and responsibility directly to each of the heirs. Neither is there any evidence that American Archives controlled or even sought to control Sullivan's services to the heirs.

6. It is agreed between the parties that Sullivan acted in good faith. It is clear that he violated no standard of professional conduct, even technically.

7. The case having been submitted to the lower court on an agreed statement of facts, no presumption is to be indulged in favor of the lower court's judgment. This Court is free to reach its own conclusions upon the agreed facts of the case as if it were trying the case originally.

II. Standing

Sullivan has standing to pursue this appeal because he got less than the full relief to which he was entitled, namely, a dismissal exonerating him from any charges of professional misconduct, and because he is seriously injured and prejudiced by the judgment as it now stands and should not be foreclosed from removing this blot from his record.

ARGUMENT

I. The District Court's Informal Censure of Sullivan Was Without Foundation in the Evidence and Should Be Reversed

1. *What this case is, and what it is not.*—In our view the Court below could have fallen into its error, so injurious to Sullivan, only by confusing, in its busyness, the facts of this case with the facts of some other possible case not before it. This case is concerned with Sullivan's conduct, not with the conduct of American Archives, and not with the conduct of some other heir-finder whose methods of operation might or might not differ from those of American Archives in this case. It is concerned with the conduct of Sullivan at the time he was retained by American Archives and at the time, or times, when he was employed by the heirs. Whether it was or was not proper for American Archives to seek out and find unknown, nonresident heirs who otherwise stood to lose their interests in an estate, by way of escheat, is not essential to a determination of this appeal, although it is difficult for us to find a basis for condemning the function performed by American Archives. That the heirs who had thus been found and enabled to receive their birthrights were to pay for the services of the finder in finding them and securing proof of their relationship does not appear to be unreasonable or improper, nor does it appear that any objection was ever raised by any of the assigning heirs to either the idea or the amount of the payment. There is no evidence that any of the assigning heirs made any complaint to anyone, or indicated any dissatisfaction whatever, either before or after making the assignments of fractional shares of their interests for the consideration of the obviously valuable service that had been rendered to them by the heir-finder, American Archives. But in any event, whatever one may think, good or bad, of what American Archives did, this case concerns solely what Sullivan did. American Archives retained Sullivan for the one purpose

of representing its assignment interests in this matter. Sullivan was not a general legal adviser to American Archives.

At the time of Sullivan's retainer by American Archives in this matter, the estate proceeding had already been commenced, a petition for letters of administration (with its allegation of no known heirs) had already been filed, and American Archives had located, and obtained fractional assignments from, heirs of the estate. Furthermore, it is explicitly stated in the stipulation of facts that Sullivan undertook his representation of American Archives and of the heirs in good faith.

Sullivan did not search out the heirs, and was not in any way connected with or privy to either the search for the heirs or the obtaining of assignments from them. He made no contract to represent any of them upon a contingent fee basis. Neither did he have a contingent fee contract with American Archives. He made no agreement with the heirs or with American Archives that he would bear any costs of litigation. Nor did American Archives, either before or after obtaining the assignments, enter into any agreement with the heirs that it would prosecute the litigation or bear the costs of litigation.

It is true that Sullivan was retained by the heirs on a no-charge basis, but this was no sin. He had a fee arrangement with American Archives. His later retention by the heirs, on a no-charge basis, was by their own free choice after they had given their assignments to American Archives. The interests of these non-resident heirs and that of their partial assignee, American Archives, were so connected and in such community, that such arrangement was convenient and natural, as well as proper. It should also be noted that the assignments were not obtained by American Archives upon any agreement that it would select or provide counsel for the heirs.

With the foregoing clarification of what, indisputably, the facts here are and are not, we turn to discussion of the adverse findings of the District Court.

2. *Champerty.*—It is the well-settled law of the District of Columbia, and has been so held by all of its courts for at least the past ninety years, that an agreement by a person who had no previous interest in the subject matter of a suit, to undertake its litigation for a contingent fee or share of the proceeds, is champertous if such person also undertakes to bear the costs of litigation,[3] and is not champertous if he does not so undertake.[4] If the person undertaking to prosecute and bear costs of litigation had a previous interest in the subject matter of the suit, it would of course not be champerty.[5]

With the law in the District of Columbia so indubitably settled, there is no need to look to the law of other jurisdictions. Nevertheless, before applying local law to the facts of this case, we note for the sake of completeness that most American jurisdictions,[6] the standard texts on

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[3] The examples are: *Peck* v. *Heurich*, 167 U.S. 624, 632; *Johnson* v. *Van Wyck*, 4 App. D.C. 294, 315-316; *Warder* v. *Newburgh*, 40 App. D.C. 385; *Merlaud* v. *National Metropolitan Bank*, 65 App. D.C. 385, 387, 84 F. 2d 238, 240; and *Roller* v. *Murray*, 46 App. D.C. 246.

[4] The examples are: *Wright* v. *Tebbitts*, 91 U.S. 252; *Stanton, et al.* v. *Embry, Administrator*, 93 U.S. 548; *McPherson* v. *Cox*, 96 U.S. 404, 416; *Taylor* v. *Bemiss*, 110 U.S. 42; *Burbridge* v. *Fackler*, 2 MacArthur 407, 9 D.C. 407; *Dale* v. *Richards*, 21 D.C. 312, 323; *Golden Commissary Corporation* v. *Shipley*, (D.C. Mun. App.) 157 A. 2d 810; and *Estate of Clyde E. Lott, Deceased*, Admn. No. 86,184, order of U.S.D.C.D.C., May 1, 1959, directing payment of American Archives' assignments (identical to those represented here by Sullivan, except as to percentages).

[5] Brannan v. Stark, 87 U.S. App. D.C. 388, 185 F. 2d 871, and see also Restatement of the Law—Contracts, Sec. 547(2).

[6] *Watkins* v. *Sedbury*, 261 U.S. 571, 576 (contingent fee with undertaking by attorney to bear costs held champertous); *Richette* v. *Solomon*, 410 Pa. 6, 21, 187A 2d. 910, 918 (contingent fee with no undertaking by attorney to bear costs held valid); *Grayson* v *Grayson*, 184 Kan. 116, 334 P. 2d 341 (contingent fee with no undertaking by attorney to bear costs

contracts,[7] the Canons of Ethics,[8] and the leading authority on legal ethics,[9] all are in accord with District of Columbia law. All require (1) an agreement for a contingent fee or share; (2) no previous interest in the subject matter of the litigation; (3) an agreement to prosecute the litigation; and (4) an undertaking to bear the costs of the litigation.

The Court below relied solely on this Court's decision in *Merlaud* v. *National Metropolitan Bank*, 65 App. D.C. 385, 84 F. 2d 238. That decision, the District Court said, "should have flashed a warning light to those concerned in the particular factual picture presented here" (JA 20). But *Merlaud* held the contingent fee contract of an heir-finder champertous, and therefore unenforceable by the heir-finder, precisely because the heir-finder undertook to prosecute the claim and bear the costs. See the *Merlaud* opinion, 65 App. D.C. at p. 387, 84 F. 2d at p. 240. "In the particular factual picture presented here", Sullivan made no contingent fee contract, and did not undertake to

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held valid); *Skinner* v. *Morrow*, (Ky.) 318 S.W. 2d 419, 429 (heir finder's contingent fee with undertaking by heir finder to bear costs held champertous); *Boettcher* v. *Criscione*, 180 Kan. 39, 44, 45, 299 P. 2d 806, 811, modified at 180 Kan. 484, 305 P. 2d 1055 (contingent fee in estate with undertaking by attorney to bear costs held champertous); *Mock* v. *Higgins*, 3 Ill. App. 2d 281, 121 N.E. 2d 865 (contingent fee for establishing heirship with no undertaking by attorney to bear costs held valid); *Sparne* v. *Altshuler*, 80 R.I. 96, 90 A. 2d 919 (heir finder's contingent fee with no undertaking by heir finder to bear costs held valid); *J.B.P. Holding Corporation* v. *United States*, 166 F. Supp. 324, 326 (S.D.N.Y.), rev'd on other grounds sub. nom. *Application of Kammerman*, 278 F. 2d 411 (C.A. 2) (contingent fee with no undertaking by attorney to bear costs held valid).

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[7] *Williston on Contracts* (Revd. Ed.), Sec. 1712; *Corbin on Contracts*, Secc. 1424; *Restatement of the Law—Contracts*, Sec. 542 and Sec. 547(2).

[8] A.B.A. Canons of Professional and Judicial Ethics, and Opinions of Committee on Professional Ethics and Grievances (1957 Ed.), Canons 13 and 42 at pages 12 and 40, respectively, and Opinion 246 at p. 493.

[9] Henry S. Drinker, *Legal Ethics*, p. 66. Mr. Drinker was for many years the Chairman of the A.B.A.'s Committee on Ethics.

pay anyone's costs.[10] Such, in this case, are the simple and agreed facts. They show no champerty. The District Court's finding with respect to champerty plainly had no foundation in law or fact.

3. *"Fomenting Litigation."*—"Fomenting litigation," unlike champerty, is not a well-defined form of professional misconduct. If we take the phrase in its natural sense of promoting or stirring up litigation, it includes or covers the same ground as champerty. So far as the Court below may have intended its finding of "fomenting litigation" to be a general and vague paraphrase of champerty, we have demonstrated the arbitrary nature of that finding in point 2, *supra*.

But so far as the Court below may have intended its finding of "fomenting litigation" to mean something different from champerty, A.B.A. Canon 28, entitled "Stirring up Litigation", would be the relevant Canon. That Canon[11] makes it unprofessional for an attorney, directly or through an agent, to do any of four different things. First, an attorney may not volunteer advice to bring a lawsuit, except where there is a relationship of trust. On the facts here, there is not the slightest evidence that

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[10] American Archives did not undertake either to prosecute the claims of the heirs or to bear the costs of litigation. It agreed only (see the Assignment Agreement, J.A. 15) that the heirs were not liable for the expenses of American Archives in investigating and procuring proof of relationship. But this obviously is not an undertaking to bear the costs of litigation. See *Wardman* v. *Leopold*, 66 App. D.C. 111, 85 F. 2d 277, cert. den. 299 U.S. 570; *Mock* v. *Higgins*, 3 Ill. App. 2d 281, 294-296, 121 N.E. 2d 865, 871; A.B.A. Canons of Professional and Judicial Ethics, Opinions of Committee on Professional Ethics and Grievances, Supplement to 1957 Ed., Informal Decision 338, summarized at p. 73; Henry S. Drinker, Legal Ethics, p. 178. *Sparne* v. *Altshuler*, 80 R.I. 96, 90 A. 2d 919; *Estate of Clyde R. Lott, Deceased*, Admn. No. 86,184. Order of U.S.D.C.D.C., May 1, 1959; Cf. *Kaplan* v. *Suher*, 254 Mass. 180, 150 N.E. 9; as the Court stated in *Sparne* v. *Altshuler:* "In the absence of fraud or unconscionable conduct . . . agreements of this sort have been uniformly held to be good." 80 R.I. at p. 104, 90 A. 2d at p. 923.

[11] A.B.A. Canons of Professional and Judicial Ethics, Opinions of Committee on Professional Ethics and Grievances, 1957 ed., p. 25.

Sullivan gave any such advice to anyone. Second, an attorney may not hunt up causes of actions and inform people of them in order to be retained, or seek out people with causes of action. On the facts here, there is not the slightest evidence that Sullivan for any purpose hunted up causes of action or people with causes of action. Third an attorney may not employ runners or agents to get him business. On the facts here, there is not the slightest evidence that Sullivan employed any runners or agents. Sullivan employed no one, and paid no one, to be retained by American Archives; he employed no one, and paid no one, to be retained by the heirs; he represented the heirs without charge. Fourth, an attorney may not remunerate people who influence his retention. American Archives may be considered to have "influenced" Sullivan's retention by the heirs, although not in an invidious sense. But on the agreed facts here, there is not the slightest evidence that Sullivan remunerated American Archives for "influencing" his retention by the heirs. Moreover, the litigation was already in court, a petition for letters of administration had already been filed, American Archives had already sought out heirs and had obtained assignments from them, before Sullivan even entered the picture.

Finally, there is no evidence whatever that in seeking out the heirs American Archives was acting as the agent of Sullivan (nor was this even contended) or was in any way aided or abetted by him (nor was this even contended). So much suffices in showing no evidence at all to support a finding that Sullivan "fomented" or stirred up litigation.

4. *Intrusion upon the duty of counsel to prevent his client from doing those things which the lawyer himself ought not to do.*—The Court below found generally, but with no enlightening detail, that the "relationship" between Sullivan and American Archives "intrudes upon the duty requiring counsel to use his best efforts to re-

strain and prevent the client from doing those things which the lawyer himself ought not to do." (JA 20). The meaning of this finding, in the light of the agreed facts of the case, is obscure.

The language of this particular finding obviously is taken from Canon 16 of the Canons of Professional Ethics, but has lost some of its clarity by the removal from context. The Canon reads in full as follows:

> 16. *Restraining Clients from Improprieties.*
>
> A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not do, particularly with refference to their conduct towards courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

There is nothing in the agreed facts of this case showing that the heirs or American Archives did anything that could be considered an impropriety.

If the Court below was tying the language of Canon 16 in with Canon 27, relating to solicitation, the proposition is equally without merit. While an attorney may not seek out persons and recommend himself to them, for the purpose of getting them as clients, he is not under a duty to restrain or prevent his friends, relatives, clients, or former clients from recommending him to their friends and associates if their activities are not requested or instigated by him. See Point 5, infra, for a fuller treatment of the finding as to solicitation.

On the other hand, if the District Court meant that Sullivan should have prevented American Archives from seeking out the unknown heirs, or from obtaining assignments from the heirs, or from retaining counsel to protect its assignment interests, such a proposition is likewise without merit.

On the agreed facts, American Archives sought out the heirs before it retained Sullivan. A lawyer cannot rationally be required to prevent his client from doing those things that the client has already done before the lawyer is retained. Nor can Sullivan be censured for not preventing or restraining American Archives from retaining counsel to protect its assignment interests. American Archives is engaged in a non-professional business and was free to advertise, solicit and search for such business as it could get. Like any other person or business enterprise, it was entitled to professional representation to protect the interests it had acquired. To rule otherwise would be to deny American Archives the right to counsel accorded to anyone in every American jurisdiction—even to the criminal known by his defense counsel to be guilty of the crime charged.

5. *Solicitation.*—Upon inquiry of him by American Archives, Sullivan made no objection to the assignor-heirs being informed of his representation of the assignment interests of American Archives and of his willingness to represent without charge such heirs as chose to have him do so. Each of the assignor heirs did so choose, and under their individual authorizations, Sullivan did undertake the representation of their interests in the Gage estate without charge to them. These are all of the facts pertaining to solicitation. On these facts alone, the Court below found a "relationship" that "amounts to solicitation of professional employment."

It is significant that Sullivan's employment by the heirs was without fee to Sullivan. Solicitation occurs typically when attorneys are driven by need or greed for pecuniary gain. Hence the classic cases of solicitation are the employment of runners to get negligence cases and other forms of ambulance chasing.

But even if Sullivan had charged the heirs a fee, there would have been no solicitation. Solicitation has been

condemned as unprofessional for centuries. Yet the Court below referred to no precedents or considerations in support of its action on solicitation; and we know of none. Indeed, the precedents and pertinent considerations show that the action of the Court below was erroneous and arbitrary.

A law practice begins and grows in the main on the unsolicited recommendations of the lawyer's friends and satisfied clients.[12] As the Court put it in *Chreste* v. *Commonwealth,* 171 Ky. 77, 98, 186 S.W. 919, 926: "The friends, acquaintances and associates of an attorney have, of course, the unquestioned right to sound his praises and divert to him such clients as they can persuade in a legitimate way to engage his services."

The lawyer, obviously, is not called upon to object to a recommendation by a friend or client. See Henry S. Drinker, Legal Ethics, p. 259. Here, Sullivan, as not infrequently occurs, had the opportunity to object before the recommendation. In other cases, the lawyer has the opportunity to object after the first recommendation by a friend or client and before the next recommendation by the same friend or client. All lawyers have the opportunity at the beginning of their law practices, and continuously thereafter, to advise everyone of their objection to all recommendations, so limiting their employment to persons personally known to them. The lack of objection by the lawyer in all of these cases is the same. In none of them is there any solicitation. A.B.A. Canons of Professional and Judicial Ethics, Opinions of Committee on Professional Ethics and Grievances, 1957 Ed., Opinion, 282, p. 591; Informal Decision No. 327, summarized in Supplement to the 1957 Ed., A.B.A., *supra,* p. 72; see Henry S. Drinker, Legal Ethics, p. 250, 260; *Brotherhood of R.R. Trainmen* v. *Virginia,* 377 U.S. 1, 6-7.

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12 See Informal Decision No. 679 of A.B.A. Committee on Professional Ethics, issued July 1, 1963.

A salaried insurance company attorney can properly represent an insured within the limits of his policy, and can do so without fee to the insured, Opinion 282, *supra.* A lawyer can properly be retained by a collection agency to represent a creditor where the collection agency is authorized to retain counsel, and the lawyer does not solicit his retention. Informal decision 327, *supra.* So, too, "a lawyer may accept cases for which he is recommended by a collection agency, provided they make such recommendation only in specific cases where the lawyer's services are needed." Drinker, Legal Ethics, *supra,* p. 260. And a lawyer "may permit a casualty company, required to defend all accidents against the insured, to have posted on its policy a notice that he should be notified in the event of accident." id., p. 260, and see also p. 250. All of these areas of proper professional conduct plainly involve the repeated failure by the lawyer to object to the client's recommendations of his employment by others in a known and consistent pattern of business conduct. The lack of solicitation in Sullivan's case follows *a fortiori* from all of the foregoing authorities.

It was to the interest of both the assignor-heirs and American Archives, the partial assignee, for the heirs to realize their shares of the estate. In circumstances of common interests such as these, the authorities agree that it is entirely proper for the attorney (Sullivan here), first retained by one of the common interests (American Archives) to accept employment on the same matter, with or without charge, by such of the other common interests (the assignor-heirs) as "may, without his active intervention, be persuaded by his [first] client to employ him." A.B.A. Canons of Professional and Judicial Ethics, Opinions of Committee on Professional Ethics and Grievances (1957 ed.), Opinion 111, p. 237, 238; Henry S. Drinker,

Legal Ethics, p. 66, 251.[13] Those are precisely the facts here.

6. *Intervention by a lay agency between attorney and client.*—American Archives was not the attorney in fact for the heirs, or empowered by them to select, hire, fire and direct attorneys in their behalf—activities that might well be held to constitute the unauthoirzed practice of law. Cf. the facts of *Merlaud* v. *National Metropolitan Bank,* 65 App. D.C. 385, 84 F. 2d 238. The work of American Archives was limited to investigation and securing proof of relationship. The assignor-heirs were at all times free to employ Sullivan or not. When they employed Sullivan, he, as stated in the agreed Statement of Facts, "undertook their representation" (JA 13). There is absolutely no evidence that Sullivan, in his representation of the heirs, had anything but a personal relationship and responsibility directly to each of them as advocated by Canon 35. See A.B.A. Canons of Professional and Judicial Ethics, p. 33, cited *supra.* Neither is there any evidence of American Archives' controlling or seeking to control Sullivan's services to the heirs, or of Sullivan's splitting fees for such services with American Archives (there were no fees to split). On the agreed evidence here there was clearly no intervention of a layman between lawyer and client. See Canon 35, *supra;* Opinion No. 282, A.B.A. citation *supra* at p. 591; and Informal Decision No. 327, A.B.A. citation *supra,* Supplement to the 1957 edition, at p. 72; *In re Cohen's Estate,* 152 P. 2d 485 (Dist. C. of A., Calif.).

7. *This Court's broad power of review of findings in an agreed case below*—When, as here, the case was submitted to the lower court on an agreed statement of facts, with

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[13] Indeed, where there is a common interest, Mr. Drinker considers it proper for the attorney himself to see to it that the other common interests are properly represented. See Henry S. Drinker, Legal Ethics, p. 251 and also p. 66. Both authorities (A.B.A. Opinion No. 111 and Mr. Drinker) agree on the propriety of Sullivan's conduct.

no oral evidence, the findings of the lower court present questions of law, and the appellate court is to consider it as if trying the case originally.[14]

As stated in *General Asbestos & Supply Co.* v. *Aetna Casualty & Surety Co.*, (Ind.) 198 N.E. 813, 815:

> On appeal from a judgment rendered on a trial by agreed case, no presumptions are indulged in favor of the judgment of the trial court, because this [appellate] court has the same means as the trial court of reaching a correct conclusion of law upon the agreed facts of the case, and they will be considered as if this court were trying the case originally.

8. *Conclusion on the merits.*—Sullivan, it is agreed, acted in good faith in undertaking his representation of American Archives and the heirs. Had he in doing so departed in some way from some standard of professional ethics, he ought not "to be subjected to discipline or unwarranted publicity when his conduct involves no element of inherent wrong, immorality or dishonesty." See *In re Hearings Concerning Canon* 35, 132 Colo. 591, 605, 296 P. 2d 465, 473. Actually, as we have shown, Sullivan violated no standard of professional conduct, and the adverse portion of the decision below should be reversed and eliminated by way of reformation, for it finds no support in the law or the facts.

This is not to say that the Court below is powerless to reach and make rules governing the activities of those who participate in such champertous heir-finding activities as described in *Merlaud, supra,* or even in such heir-finding

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[14] *Gar Wood Industries* v. *Colonial Homes, Inc.*, 305 Mass. 41, 24 N.E. 2d 767; *Bay State York Co.* v. *Marvix, Inc.*, 331 Mass. 407, 119 N.E. 2d 727; *Fiduciary Trust Co.* v. *Mishou*, 321 Mass. 615, 75 N.E. 2d 3; *General Asbestos & Supply Co.* v. *Aetna Casualty & Surety Co.*, 101 Ind. App. 207, 198 N.E. 813; *Odom* v. *Turner*, 204 Okla. 370, 230 P. 2d 487; *Davis* v. *Vermillion*, 173 Kan. 508, 249 P. 2d 625; *Wise* v. *Strong*, (Mo.) 341 S.W. 2d 633; *State* v. *Patrick*, (Mo.) 370 S.W. 2d 254; *Westmoreland* v. *Birmingham Trust & Sav. Bank*, 214 Ala. 593, 108 So. 536.

activities as are presented here. The Court below has a rule-making power both with respect to its enrolled attorneys, and the administration of its probate division. The exercise of that rule-making power is not necessarily limited by the precedents on professional misconduct; and where the court below may believe its power insufficient to secure the results found to be required in the public interest, after thorough investigation and consideration, the Court may recommend and effectively pursue remedial legislation. In such inquiry, the Court, and the Congress, if necessary, can learn the facts of the various and different methods used in the heir-finding industry, and consult and balance all of the diverse interests concerned. In such inquiry distinction may or may not be thought to be required, for example, between the case of known heirs who would be found in the normal course without the aid of an heir-finder, and the case of an unknown heir who probably will not be found without the help of an heir finder; or between an heir finder whose charge is reasonably commensurate with the value of the services he renders, and an heir finder whose charges are considered excessive. No doubt in recognition of such considerations, the panel of judges below recommended the adoption of a rule "in matters of this kind" for "monitorial guidance to the Bar and implemental and administrative direction to the Register of Wills" (JA 21). With this we have no quarrel. Our complaint is that prior to such action Sullivan has been censured for conduct professionally proper under all known standards and precedents pertaining to professional ethics and champerty.

II. Sullivan Has Standing to Appeal From the District Court's Action in Censuring Him

In this Court, the Committee moved to dismiss this appeal on the asserted ground of Sullivan's lack of standing to pursue it. The Committee's motion was denied without prejudice to its renewal at hearing on the merits. The

Committee may renew its motion; and, if not, the Court may want to be satisfied on the point of standing, although it does not, strictly speaking, concern the Court's jurisdiction.[15]

The Committee, on its motion to dismiss the appeal, relied on cases stating general propositions relating to standing. None of those cases concerns the censuring or other disciplining of an attorney, or is reasonably analogous.

The disciplining of an attorney is appealable whether the punishment meted out be disbarment,[16] suspension,[17] or censure (sometimes called reprimand).[18] All of these punishments are imposed for professional misconduct, and, in descending degree from disbarment to censure, they all injure an attorney. As to censure, the injury to the attorney exists whether the censure is formal or informal and even if it is accompanied by dismissal of the charges.[19] Each is equally a "serious reflection upon his professional conduct." See *Hauser* v. *Herzog*, 141 App. Div. 522, 524, 126 N.Y.S. 337, 339 (1st Dept.). As the Court, in *In re Lincoln*, 283 P. 965 (D.C. of A., Calif.), stated when refusing to dismiss an attorney's appeal for mootness because his period of suspension had expired:

> . . . it [is] just to remove from the name of a member of the ancient and honorable profession of the law

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[15] There is no question of the Court's jurisdiction to entertain this appeal. 28 U.S.C. Sec. 1291; F.R.C.P. Rule 73.

[16] *In re Fletcher*, 71 App. D.C. 108, 109-110, 107 F. 2d 666, 667-668, cert. den. 309 U.S. 664; *Tulman* v. *Committee on Admissions and Grievances*, 77 App. D.C. 357, 135 F. 2d 268; *In re Patterson*, 176 F. 2d 966 (C.A. 9).

[17] *In re Chopak*, 160 F. 2d 886 (C.A. 2), cert. den. 331 U.S. 835; *Hancock* v. *Andrews*, 161 F. 2d 547 (C.A. 5); *Stringer* v. *United States*, 225 F. 2d 676 (C.A. 9); *In re Lincoln*, 283 P. 965 (D.C. of A., Calif.).

[18] *State* v. *Tracy*, 115 Iowa 71, 87 N.W. 727; see *In re Patterson*, 176 F. 2d 966, 968 (C.A. 9).

[19] For example, see *State* v. *Tracy*, 115 Iowa 71, 87 N.W. 727, where appeal was allowed.

> the stain of a judgment which brands him as unfaithful to the trust reposed in him. There is no asset to be posssessed by the lawyer so dear or so valuable as his known character, or reputation, for honesty, integrity, and sincerity of purpose. When it is wrongfully assailed, he is damaged, not only in the finer sensibilities, but also in a financial measure impossible to accurately estimate. We hold to the opinion that the appellant should not be foreclosed of his right to remove this blot upon his record, if in fact he was wrongfully convicted.

That the proceeding below ended with a formal order of dismissal is the beginning and not the end of the question of standing. The question is not decided by the fact of the District Court's order being in form apparently favorable to Sullivan.[20] It is to be decided upon whether Sullivan is "aggrieved" by the action of the District Court, or to put it in less technical terms, whether Sullivan in the District Court got the full relief to which he was entitled.[21] Essentially, the question is whether the action of the Court below results in an injustice to Sullivan. A party may appeal "his own judgment where injustice has been done him." See *United States* v. *Dashiel,* 70 U.S. (3 Wall.) 688, 701.

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[20] *Spencer* v. *Nelson,* 30 Cal. 2d 162, 164, 180 P. 2d 886, 887; *In re Wilson's Estate,* 309 N.Y. 1011, 1012, 133 N.E. 2d 458, 459; *Fenton* v. *Thompson,* 352 Mo. 199, 176 S.W. 2d 456 (Mo.). In each of these cases, the appellant had won below, at least in form, but was allowed his appeal nevertheless—in *Spencer* because an order of new trial (a final order by statute in California) had been granted to appellant on but one issue and not several as asserted by him; in *Wilson's Estate* because appellant who had won on the merits in the trial court had lost that victory by reason of the jurisdictional dismissal of the charges against appellant by the intermediate appellate court; and in *Fenton* because a judgment of dismissal in appellant's favor was not stated, as he claimed it should have been, to be "with prejudice."

[21] See *Aetna Casualty & Surety Co.* v. *Cunningham,* 224 F. 2d 478, 480-481 (C.A. 5). In this case, appellant claimed one sum of money on separate grounds of contract and fraud. It got judgment for the full sum, but only on its claim grounded on contract. Its appeal was nevertheless allowed because a judgment for the same sum on the ground of fraud, unlike a judgment resting on contract, might not be barred in a future bankruptcy of the judgment debtor.

Sullivan denied the charges against him, and sought their dismissal for lack of any showing of improper conduct. If we are right that the stipulated facts show such lack, he was entitled to that relief. Instead, he got far less—a dismissal with highly injurious and prejudicial findings of improper conduct tacked on to it. To say, as the Committee implies, that the one type of dismissal is as good as the other, is a cynical play on words. The injustice to Sullivan in the action of the Court below is obvious—if, of course, as we maintain, the findings are unsupported by the facts and the law.

There are still other considerations which support Sullivan's standing to pursue this appeal. The Court below was satisfied with censure of Sullivan, accompanied by formal dismissal of the charges. Notwithstanding the dismissal, such censure could be used as the basis for adverse action against Sullivan in another court, or could be used as the basis for denial of Sullivan's bar admission elsewhere. Cf. *Hancock* v. *Andrews,* 161 F. 2d 547 (C.A. 5). Sullivan, a resident of Maryland, desires admission to the Bar of that State. The Maryland application form, like that of most, if not all jurisdictions, inquires: "12. Have you been disbarred, suspended from practice, reprimanded, censured or otherwise disciplined. . . If so, state . . . facts, the disposition of the matter, and the name and address of the authority in possession of the record thereof." Until this Court rectifies the injustice to Sullivan in this proceeding, application by him for admission to the Maryland bar would risk a denial based on the action of the Court below.

Moreover, in any future disciplinary proceeding against Sullivan, the adverse finding in this case would weigh heavily against him.[22] See *Dorsey* v. *Kingsland,* 84 App.

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[22] The contemplation of some future disciplinary proceeding against Sullivan does not imply that he plans some questionable action. Disciplinary proceedings, as this case demonstrates, are rather easily come by. Here, in a free-wheeling development, a dispute between Sullivan and the Register of Wills on the payment of a funeral bill was referred to the Committee for adjudication, and ended up with charges made against Sullivan with no basis in the law or the evidence. See Point I, *supra.*

D.C. 264, 265, 173 F. 2d 405, 406, rev'd on other grounds 338 U.S. 318; *In re Chopak*, 160 F. 2d 886, 887 (C.A. 2), cert. den. 331 U.S. 385.

Sullivan's standing is plain enough. But if additional support be needed we rely upon this Court's supervisory power and its power under the All Writs statute, 28 U.S.C. Sec. 1651(a), to correct a clear abuse of discretion by the District Court; for here there is no support in law or fact for that Court's adverse action (Point I, *supra*). And, finally, since this Court has, like all courts, the duty to protect attorneys from unwarranted attacks,[23] Sullivan has the correlative standing to persuade the Court of the unwarranted nature of the attacks made against him in the action of the Court below.

CONCLUSION

The judgment of the District Court should be reversed with directions to eliminate the adverse findings and conclusions contained therein, and with directions to enter a dismissal exonerating appellant.

Respectfully submitted,

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[23] See *United States* v. *Edwards*, 152 F. Supp. 179, 185 (D.C.D.C.); *Hauser* v. *Herzog*, 141 App. Div. 522, 524, 126 N.Y.S. 337, 339 (1st Dept.); *Hurdman* v. *Kelly*, 251 App. Div. 892, 297 N.Y.S. 114, 116 (2d Dept.); *In re Carvelo's Petition*, 352 P. 2d 616 (Sup. Ct., Hawaii).

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PAL

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,732

DONALD M. SULLIVAN,

Appellant,

v.

THE COMMITTEE ON ADMISSIONS AND GRIEVANCES
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of Appellee the questions are:

1. In a disciplinary proceeding where the Court, in its Opinion and Findings, stated that the respondent did engage in professional misconduct, but added that it would not "enter any formal order of censure against the respondent while others similarly situate remain untouched in the wings * *", and therefore dismissed the charges,

(a) Does respondent have the right to appeal from the Order which merely dismissed the charges?

(b) Does not respondent's action in appealing tend to indicate he still does not realize that his conduct was improper; that the Trial Court's indulgence to him was wasted, and that this Court should express its opinion of respondent's misconduct?

(c) If this Court concludes that respondent has the right to appeal, then is not the proper action to remand, with instructions to enter an order in keeping with the findings as to misconduct?

2. Where, in a disciplinary proceeding, it appears that respondent is employed by an heir hunting organization, a lay agency, which holds assignments from twelve heirs of 40 percent of the interest of each of said heirs in an estate, and respondent authorizes said lay agent to write to the assignors that the agent has employed respondent and will pay his fee and that respondent is willing to represent the heirs without charge, and the lay agent sends with said letter a proposed letter for the assignors to send to respondent by which the assignors authorize respondent to enter his appearance for and to represent the heirs without charge, and pursuant to such authorizations, respondent does enter his appearance for and does represent said heirs in the probate case, and seeks to have one of his individual clients, or, in the alternative, a specific bank, appointed administrator, but does not enter his appear-

ance for, nor disclose the interest of his chief client, the lay organization, which pays his fee, and does not advise his individual clients as to the possible conflict of interest, is not the respondent guilty of professional misconduct?

3. Does not the situation as outlined in paragraph 2 above result in (a) giving control of the litigation to the lay organization; (b) in a conflict of interest between the lay agency and the individual clients, and in creating such condition as renders it impossible for respondent to conform to his duties to the individual clients and to his lay agency client; and (c) in respondent, directly or indirectly, engaging in or authorizing the solicitation of clients, not for the purpose of an additional fee, but for the purpose of giving control of the litigation to the lay agent?

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THE COMMITTEE ON ADMISSIONS AND GRIEVANCES
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Appellee.

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BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

It is believed that Appellant's statement is so slanted that it is impossible to adopt it subject to corrections, and therefore, it is advisable to set forth a comprehensive statement.

Charges were brought against Donald M. Sullivan (hereinafter called Sullivan) by the Committee on Admissions and Grievances of the United States District Court for the District of Columbia. (JA 2-5)

The Charges allege that Sullivan violated certain Canons of Professional Ethics, namely: Canon 28, relating to the stirring up of litigation; Canon 27, condemning the solicitation of professional employment; Canon 16, requiring that a lawyer use his best efforts to prevent his clients from doing those things which the lawyer himself ought not to do; Canon 35, prohibiting the control of the services of a lawyer by a lay agency which intervenes between client and lawyer; and Canon 6, making it unprofessional to represent conflicting interests. (JA 4).

The Charges allege that the American Archives Association (hereinafter referred to as Archives), a missing heir finding organization, found the paternal heirs, 12 of the total of 14 heirs of Margaret Delano Gage, and secured agreements from them providing that each would pay to Archives 40 percent of any amounts which said heirs might receive from the proceeds of an estate, the name of which was not disclosed until Archives had exhausted its efforts to induce all of the heirs to give it assignments. (See Report and Recommendations to the Court by the Grievance Subcommittee (JA 26)), and see paragraphs 3, 5 and 6 of the Answer of Cross-Petitioner, Helen Durfee Palmer, filed in the Probate case (JA 43) that the inducement offered by Archives to said heirs to execute an assignment in blank of a two-fifths interest in an unnamed estate was the promise by Archives to reveal the name of a deceased person in whose estate the heirs purportedly had an interest; said decedent being, in fact, Margaret Delano Gage. See #6 of the Answer of said Cross-Petitioner (JA 43). Attached to said Answer of said Cross-Petitioner are the two forms of agreement which Archives wanted the so-called missing heirs to execute. (JA 49-51)

Sullivan was employed by Archives to represent it in the Gage Estate proceedings; Archives asked Sullivan if he had objections to Archives' advising the said 12 paternal Gage heirs who had made assignments to it that Sullivan represented it and that if they desired to employ Sullivan as their attorney in the Gage estate matter, he would do so with-

out charge; Sullivan answered that he had no objection. (JA 12) Accordingly, Archives, in a letter to the heirs, wrote that Sullivan had been engaged to "protect the interest of Archives in the estate and, since your interest is identical with that of Archives * * Mr. Sullivan is willing to serve as attorney of record for you as well". All of said 12 heirs accepted this offer and employed Sullivan "without charge". (JA 17-18) In the Probate case Sullivan entered his appearance for said heirs, but did not enter his appearance of record for Archives, which employed him and paid his fee.

Sullivan sought to have one of said heirs, or, in the alternative, a specific bank, appointed administrator, so that he would be the attorney for the administrator and would then control the case. (JA 42, 44, 46, 51)

The Committee did agree that in their opinion Sullivan "undertook his representations of the American Archives Association and the heirs in good faith." Sullivan, in his Statement of the Case and in his Argument, tries to interpret this as an admission by the Committee that he acted throughout in good faith. In this, Sullivan is in error, and the error must be emphasized. The Committee brought to Sullivan's attention cases which held that similar conduct was improper and also brought to his attention various Canons of the Canons of Professional Ethics which his conduct violated. See Committee Report to the Court. (JA 27)

The parties signed a Stipulation and Sullivan states that the case was tried upon that record. The record, in fact, consisted of said Stipulation and the papers in the Estate of Margaret Delano Gage, deceased, Administration No. 105,442, of which latter proceedings the Trial Court took judicial notice. See the Memorandum Opinion (JA 19).

Sullivan, in his Statement of the Case and in his Argument, endeavors to place Archives in one vacuum and Sullivan in another vacuum so that neither shall be adversely affected by the acts of the other. In passing upon the Charges and the critical observations of the Court, as set out in the Court's Opinion (JA 19), Sullivan's conduct must be considered

in the light of his employment by a lay agency; his conduct in carrying out this employment and in the atmosphere of what he knew this client did and of what he consented that the client do; his failure to recognize that there was a conflict of interest; his failure to recognize that in consenting that his client solicit clients for him, stressing the alleged identity of interests, that he, in effect, was soliciting clients through a lay agency. His error was pointed out to him and he was referred to cases supporting the points made by the Committee (JA 27), yet he still contended that his representation of Archives and the heirs was proper and that he was not guilty of a violation of any of said Canons of Professional Ethics, and he continued to represent Archives and his individual clients.

On June 2, 1962, Judge Tamm, sitting as Probate Judge in the Gage Probate case, signed an Order appointing The Riggs National Bank as administrator; Sullivan, in behalf of the 12 Gage paternal heirs, appealed to this Court from said Order. This Court remanded the matter to the District Court for further proceedings in the light of its opinion. *Gage v. The Riggs National Bank*, 115 U.S. App. D.C. 396; 320 F.2d 715 (1963).

On remand, the matter was heard by Honorable Joseph C. McGarraghy, who, on July 22, 1963, filed a Memorandum Opinion. (See Folder No. 2 in the Probate Case, which is a part of the Record (JA 51).) Judge McGarraghy, in said Opinion, pointed out:

(1) That although the Gage cross petition for administration, originally filed in the case, was ostensibly filed on behalf of the petitioner by his own counsel, Sullivan, the fact is that without any disclosure to the Court, counsel actually represented not only the petitioner and the other paternal first cousins, but primarily was representing an Association known as the American Archives Association, which originally retained said counsel and arranged for his compensation (JA 55);

(2) That the claim of Archives would be approximately $70,000.00, almost five times the share of any one of the paternal heirs, but the

Court was not so advised, nor was it informed that the attorney for petitioner was representing Archives (JA 56);

(3) That said Petition did not list the two maternal cousins, although it is reasonable to conclude that Archives and its attorney knew full well the names and relationship of them (JA 56);

(4) That Archives controls this litigation (JA 56); and

(5) That there is a possibility of serious conflict of interests, a serious question as to the validity of the agreement between Archives and the 12 paternal heirs (JA 57).

Judge McGarraghy appointed The Riggs National Bank as administrator, and Sullivan, in behalf of the Gage heirs, again appealed; this Court affirmed, *Gage v. The Riggs National Bank,* 119 U.S. App. D.C. 69, 337 F.2d 105 (1964).

At this hearing before Judge McGarraghy, an interesting colloquy took place, as follows:

> The Court: In this case you do represent the American Archives Association?
>
> Mr. Sullivan: That is correct, your Honor.
>
> The Court: You have a fee agreement with them?
>
> Mr. Sullivan: I have a fee agreement with American Archives Association.
>
> The Court: And then if Mr. John Franklin Gage should be appointed administrator you would represent him as administrator, would you not?
>
> Mr. Sullivan: If necessary, your Honor, I would. I do not deem it essential. If I did represent him as administrator, I would not claim a fee from the estate as counsel for the administrator.
>
> The Court: That was the next question I was getting to. Would you be entitled to compensation as attorney

> for the estate as well as compensation from American Archives Association out of — which I assume they pay you from — this forty percent?
>
> Mr. Sullivan: Well, as to the question of whether I would be entitled, I don't know. I would state to your Honor that I would not accept or ask for compensation. (JA 60, 61)

The Administrator filed a first and final account under the appointment made August 30, 1963; Sullivan, representing the paternal heirs, filed exceptions; the Probate Court overruled the exceptions, describing the exceptions as frivolous (See Jacket No. 2 in the Probate case; Memorandum filed January 30, 1964 (JA 59); Sullivan again appealed to this Court; this Court, in affirming, stated that the claims of disqualification seem "wholly lacking in substance". *Gage v. The Riggs National Bank,* 119 U.S. App. D.C. 355, 342 F.2d 934 (1965).

The Trial Court, in the disciplinary cause, did criticize Sullivan in its Opinion, but in its Order dismissed the Charges, and Sullivan appealed.

Sullivan states that this is an appeal from a part of a judgment of the District Court and that said judgment "included by express reference the Findings of Fact and Conclusions of Law set forth in its Memorandum Opinion". Sullivan misstates the Order of Judgment. The Order states:

> "This matter came on for hearing upon the Charges filed by the Committee on Admissions and Grievances of this Court, the Answer of the respondent, Donald M. Sullivan, the Stipulation of Facts filed on the 6th day of May, 1965, and was submitted to the Court on said record. This Court having rendered its Memorandum Opinion on May 25, 1965, in which are set forth its Findings of Fact and Conclusions of Law, it is for the reasons set forth in said Memorandum Opinion this 18th day of June, 1965,

> "ORDERED, that the charges be and the same are hereby dismissed" (JA 21, 22)

It is noted that the Order of Dismissal states that "the charges be and the same are hereby dismissed". The Order did not include "by express reference the Findings of Fact and Conclusions of Law * *", as alleged by appellant, but merely referred to the Memorandum Order as a statement of the reasons for the Court's Order.

This appeal is not from the Order, which limited itself to the dismissal of the charges, but is, in effect, a motion to strike the portion of the Memorandum Opinion which is critical (and justly so) of Sullivan's conduct. The dismissal is in no way based or bottomed upon the critical remarks set forth in the Court's opinion, which indeed would have supported a contrary result. The dismissal is explained by the Court in its opinion in these words:

> "We are not disposed, however, to enter any formal order of censure against the respondent while others similarly situate remain untouched in the wings because the question has hitherto not been formally raised." (JA 20)

The appellee moved in this Court for dismissal of Sullivan's appeal upon the grounds that he has no standing to pursue an appeal from the judgment of the District Court which granted him full relief and in no way impaired his legal rights, and upon the further ground that the appeal was not from the Order itself, which was favorable to appellant, but was from the expression of views in the Opinion of the Court, which views were fully justified. This Motion was denied without prejudice to its renewal at the hearing on the merits. Appellee renews this Motion.

STATUTES, REGULATIONS AND RULES CITED

Canons of Professional Ethics
(Pursuant to Rule 17(b)(6))

CANON 6. ADVERSE INFLUENCES AND CONFLICTING INTERESTS.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

CANON 16. RESTRAINING CLIENTS FROM IMPROPRIETIES.

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

CANON 27. ADVERTISING, DIRECT OR INDIRECT.

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the bar; schools attended, with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions, memberships and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; the fact of listings in other reputable law lists; the names and addresses of references; and, with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Special Committee on Law Lists may be treated as evidence that such list is reputable.

CANON 28. STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENTS.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

CANON 35. INTERMEDIARIES.

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be

direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

SUMMARY OF ARGUMENT

1. The Opinion of the Trial Court found that respondent's conduct was improper, but stated that the Court was not disposed "to enter any formal order of censure against the respondent while others similarly situate remain untouched in the wings because the question has hitherto not been formally raised"; the Order dismissed the Charges and did nothing more. The appeal is, in fact, not from the Order, but is in effect a Motion to strike the critical remarks of the Findings which were set out in the Opinion. The appeal should be dismissed.

2. Sullivan's actions in accepting employment from the American Archives Association, which held assignments of 40% of the interest from each of the 12 paternal heirs of the Gage estate, and in permitting Archives to write to said heirs advising them that it had employed Sullivan, that the interests of heirs and of Archives were identical, and that Sullivan would represent them without charge, constituted misconduct, and except for the indulgence of the Court, justified and required a finding that said Charges are sustained.

3. That Sullivan permitted and authorized Archives to solicit clients in his behalf; that he represented clients with conflicting interests and persisted in so doing even after the matter was brought to his attention; that he permitted Archives, his lay client, to control the litigation; that he entered his appearance for his individual clients but not for his

lay client, the client with the greatest monetary interest, and the only one which paid his fee; and that as a result of the conflict of interests, the desire to control the litigation, the desire to see to it that the lay client received its fee concurrently with the payment of the share of the estate to the individual client, the case became involved in excessive litigation, including three appeals to this Court, all of which, taken together, constituted misconduct, which justified not only the remarks of the Court, but also justified disciplinary action.

ARGUMENT

1. Motion to Dismiss

Appellee heretofore filed herein a Motion to Dismiss on the ground that Appellant has no standing to pursue an appeal from the judgment of the District Court which granted the Appellant full relief, and this Court entered an Order denying said Motion without prejudice to renew the same at the time of the hearing on the merits. Pursuant to said authorization, Appellee does now renew said Motion.

The Trial Court rendered an Opinion and in said Opinion did criticize respondent's conduct (JA 19-21), and stated the charges would be dismissed for the reason that

> "We are not disposed, however, to enter any formal order of censure against the respondent while others similarly situate remain untouched in the wings because the question has hitherto not been formally raised".

Following the rendering of said Opinion the Court entered an Order dismissing the charges. The Order was short — it did not criticize respondent in any manner. Respondent apparently recognizes that under the law he cannot appeal from an Opinion but only from an Order or judgment, for under his jurisdictional statement he states "This is an appeal from a portion of a final judgment * *". In respondent's State-

ment of the Case, his first sentence reads "This is an appeal by Donald M. Sullivan, herein called "Sullivan" from *part of a judgment* of the District Court". (Emphasis supplied.) He added that the District Court's judgment of dismissal "included by express reference the Findings of Fact and Conclusions of Law set forth in its Memorandum Opinion". This is an inaccurate and erroneous statement. The judgment did not include "by express reference" the Findings of Fact.

Respondent really attempts by what he terms "an appeal" to persuade this Court to grant what might be referred to as a "Motion to Strike", the language of which he complains.

Where a judgment grants a party full relief he does not have a right to appeal because he does not like the opinion of the Court, nor because he objects to language used in the opinion or in the findings. We now refer to a few cases on this subject.

Mr. Justice Frankfurter, in footnote 5 of his opinion in *United States of America v. Shirley*, 359 U.S. 255, 3 L. Ed. 2d 789, at page 794 states:

> "This Court reviews judgments, not arguments assailing them, or seeking to sustain them."

The Supreme Court, in *Electrical Fittings Corporation v. Thomas & Betts Co.*, 307 U.S. 241, 83 L. Ed. 1263, had under consideration a suit in equity by respondents for alleged infringement of a patent. The District Court held Claim No. 1 valid but not infringed and Claim No. 2 invalid. Instead of dismissing the bill without more, the District Court entered a decree adjudging Claim No. 1 valid but dismissed the bill for failure to prove infringement. The petitioner appealed to the Circuit Court of Appeals from so much of the decree as adjudicated Claim No. 1 valid. The Supreme Court stated that the Circuit Court was of the opinion that the decree would not bind the petitioners in subsequent suits on the issue of the validity of Claim No. 1, and therefore, the appeal was dismissed on the ground that petitioners had been awarded all the relief

to which they were entitled, the litigation having terminated in their favor. The Supreme Court granted certiorari. Mr. Justice Roberts stated:

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous, which are not necessary to support the decree".

The Court then added, page 1264:

> "But here the *decree* itself purports to adjudge the validity of claim 1, and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues indicated. We think the petitioners were entitled to have this portion of the *decree* eliminated, and that the Circuit Court of Appeals had jurisdiction, as we have held this Court has, to entertain the appeal, not for the purpose of passing on the merits but to direct the reformation of the *decree.*" (Emphasis supplied.)

It is obvious that the Supreme Court was of the opinion that though the Trial Court dismissed the petition, that yet as the decree also held that Claim No. 1 was valid, that this holding, unless modified, would be binding in future litigation on this question, and therefore the case should be reversed and remanded to the Circuit Court with instructions to entertain the appeal and direct the District Court to reform the decree in accordance with the views of the Supreme Court.

To the same effect is *Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 83 L. Ed. 608. There, the Court stated, page 208:

> "The Public Service Commission, as the successful party below, has no standing to appeal from the decree denying the injunction."

Also, see *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 150, 78 L. Ed. 1182. (Statement made under Headnote 11.)

There are limited exceptions to the general rule that a winning party may not appeal. An interesting and instructive case as to such exception is *Aetna Casualty & Surety Co. v. Cunningham*, 224 F.2d 478 (5th Circuit), 69 A.L.R.2d 696. There, Aetna was surety on the bond of the contractor; there was a default and Aetna brought suit against the contractor and presented two separate claims of the right to recover the same amount (1) that Cunningham had induced Aetna to execute the bond by false representations; and (2) that in the bond Cunningham agreed to indemnify Aetna. The District Court, in its Order, held Cunningham liable under the indemnity but not guilty of fraud, and Aetna appealed. The right to appeal was contested. The Circuit Court held that while judgment on either claim would be in the same amount and payment of the judgment would bar both claims, that yet

> "* * the two claims in their origin are separate and distinct, the one resting on fraud * * and the other being on a separate contract * *".

The Court then pointed out that the judgment based solely on the agreement would be subject to the debtor's being able to obtain a discharge in the event of bankruptcy, whereas were the judgment based on fraud, the debtor would not be able to obtain a discharge.

It should also be noted that the provision complained of was in the Order.

Following the case last mentioned and beginning on page 701 of 69 A.L.R.2d, there is a fairly exhaustive annotation which refers to many cases, in some of which, where there is a favorable judgment but the judgment itself did not cover all of the rights for which the plaintiff had contended, the Courts ruled that the winning party may appeal. On the other hand, where the judgment gives to the party complaining all of the rights to which he is entitled, the Courts will not entertain an appeal where the appellant wishes the Court to change the findings or the opinion.

We have carefully examined appellant's brief under the caption "Sullivan has Standing to Appeal from the District Court's action in censuring him", and it would appear that appellant misses the point of appellee's Motion to Dismiss. Appellant states that the disciplining of an attorney is appealable whether the punishment meted out be disbarment, suspension or censure. Where there is a finding of misconduct recited in the Order and the Order provides for either disbarment, suspension or censure, there is no contention on the part of appellee that there is not the right to appeal. Our contention is that where the Order gave to the winning party all of the rights to which he is entitled, namely a dismissal of the case, that the winning party does not have the right, in effect, to seek a review of the matter in this Court and to have this Court order the Trial Court to modify its opinion or its findings which are not included in the judgment and on which the judgment is not based.

We have carefully examined all of the cases which appellant cites in support of this theory, and with all due respect to appellant, we do not find a single case which seems to support his contention that he has the right to appeal from findings referred to in the opinion, especially so where the judgment is not in any sense based upon the findings of which appellant complains. As appellant does not have the standing upon which to appeal, his appeal should be dismissed.

2. Sullivan violated certain Canons of Professional Ethics; the critical remarks and findings of the Court were justified, and, except for the great consideration and indulgence of the Court, sanctions were in order.

The Charges allege that Sullivan violated Canon 28 relating to the stirring up of litigation; Canon 27 condemning the solicitation of professional employment; Canon 16, requiring that a lawyer use his best efforts to prevent his client from doing those things which the lawyer himself ought not to do; Canon 35, prohibiting the control of a lawyer by a

lay agency which intervenes between client and lawyer; and Canon 6, making it unprofessional to represent conflicting interests.

Sullivan outlines his version of "What this case is, and what it is not". We are not willing that this case be reviewed upon Sullivan's version of what this case is and what it is not, but we are most willing it be reviewed upon a realistic version of what the case is and of what Sullivan did — and what Archives did with Sullivan's permission.

Archives learned that Miss Gage died, apparently leaving no heirs at law or next of kin but leaving a substantial estate; Archives set out to find heirs; it found 12 paternal and two maternal heirs and endeavored to persuade each heir to assign to Archives 40% of his or her interest in an estate, the name then being withheld, upon the theory "It is understood that American Archives Association has not received complete cooperation in the matter of the estate in question * * and for this reason, the full name of the decedent was not disclosed. Therefore, I hereby authorize American Archives Association to insert in the aforementioned Agreement and Assignment the full name of the decedent at such time as full cooperation is secured or at its election" (JA 51).

All 12 of the paternal heirs executed assignments; the two maternal heirs did not execute the assignments. Though not so stated in the assignment, yet reading between the lines, the words "Archives Association has not received complete cooperation" meant that Archives would not disclose the name of the estate until Archives had completed its efforts to secure the assignments. The two maternal heirs who did not sign knew they had a relative, a Miss Gage, living in Washington, and these two maternal heirs made an investigation and found the name of said relative. Archives employed Sullivan to represent it; Archives sought Sullivan's permission to write the 12 paternal heirs and advise them it had employed Sullivan; that Sullivan would represent them without charge; Sullivan consented; Archives did write said 12 paternal heirs advising that their interests and Archives' were identical and that

Sullivan would represent them without charge; all of said 12 paternal heirs employed Sullivan "without charge". As each of said heirs had agreed to pay Archives 40% of the recovery, it is understandable that they did not wish to spend more money for an attorney, and therefore accepted this offer. Undoubtedly, this is exactly what Archives and Sullivan expected. Sullivan entered his appearance for the said 12 paternal heirs but not for Archives. There is no testimony in the record that Archives controlled the litigation but from the proceedings in the Probate Court it is apparent that Archives wanted to and did control the litigation; that Archives deemed it important to have a friendly administrator, and its own attorney; Sullivan sought to have one of the heirs, or in the alternative, a specific bank, appointed administrator; and the reason for this apparently is that it wanted to be paid its 40% of the distribution concurrently with the distribution being made to each assignor, and as the heirs were out of town, this could be arranged more smoothly and effectively with its attorney and a friendly administrator. As we will point out, there are cases which hold that where the heir hunter makes a substantial charge, furnishes legal services, takes an active but undisclosed part in the litigation, and creates a situation of conflict of interests, that the agreement is voidable. Sullivan was in this position. The record does not indicate he ever disclosed this to his individual clients. In fact, he could not well do this without violating his duty to Archives, the only client who paid him a fee, albeit that Archives paid the fee in effect with money it expected to receive from its assignors, Sullivan's only clients of record.

These facts fully support the charge and Sullivan is guilty as charged.

The Court, in *Merlaud v. National Met. Bank,* 65 App. D.C. 385, 84 F.2d 238 (1936) had under consideration a similar case — there, however, the lawyer alone did what Archives and the lawyer together did in this case.

Merlaud, an attorney, found the heirs, obtained an agreement for the heirs to pay him one-third of what each received; Merlaud to pay all expenses, including attorneys' fees and Court costs. The heirs refused to pay and Merlaud brought suit in the then Supreme Court of the District of Columbia seeking to establish a lien upon the assigned funds. The Trial Court dismissed the suit, being of the view that the agreement was champertous in its nature and against public policy.

This Court, at page 387, stated that while the relations of attorney and client have resulted in recognition of the legality of contingent fees

> "We have heard of no case, however, where such contracts have been enforced when they contain a covenant by the attorney to prosecute the cause at his own cost".

In this case, Archives agreed to pay Sullivan a fee, sufficient in amount to justify its requesting Sullivan to represent the heirs "without charge", and sufficient to justify Sullivan in agreeing so to do, and in fact representing only them on the record.

Estate of William Galvin Butler v. Cox (Cal. Sup. Ct. Feb. 11, 1947), 29 Cal. 2d 419, 171 A.L.R. 343, 177 P.2d 16, involved a similar situation. There, the heir hunter obtained certain assignments to pay one-third of the amount recovered and also received powers of attorney, later these heirs revoked their assignments and the powers of attorney and executed powers of attorney to Matthew Murphy; respondent was so notified. Respondent retained counsel. The heirs filed a motion for full distribution in disregard of the assignments, which motion was denied and the heirs appealed.

On appeal, the Court stated that the invalidity of respondent's claim stems from the nature of the agreement which he solicited; there, respondent conducted his business in the following manner:

By contacting and soliciting the heirs, securing their authorization

to appear for them and employing counsel to represent them under powers of attorney or assignments; thus, as a nonlawyer, acting for prospective beneficiaries under agreements providing for his payment of

> "any and all expenses incident to the doing of the things he is authorized to do by said power of attorney, including attorneys' fees and court costs"

respondent assumes complete control of litigation instituted on behalf of the beneficiaries through attorneys hired by him and becomes a middleman intervening for profit in the conduct of legal proceedings. The Court stated that such procedure amounts to "commercial exploitation" in the practice of law.

In 171 A.L.R., page 351, there is an annotation on heir hunting; a number of cases are referred to.

It is stated that the Courts apparently look with great disfavor on organizations of the probate research type and refuse to enforce their contracts.

The notation is further to the effect that a review of the authorities shows that the attorneys engaged by organizations of this class who participate in the splitting of fees with or without work on a salary basis, have received the severe condemnation of the Court, or have, in some cases, been suspended or disbarred from practice of the law; citing a number of cases.

Attention is specifically invited to three cases referred to in 171 A.L.R. 352, et seq., in all of which the Courts passed upon the conduct of the lawyer in cases very similar to the instant case and held that the conduct was improper and in violation of the Canons of Ethics. These cases are: *Utz v. State Bar* (1942), 21 Cal. 2d 100, 130 P.2d 377; *In re Tuthill* (1939), 256 App. Div. 539, 10 N.Y.S.2d 643, 256 App. Div. 1059, 11 N.Y.S.2d 842; and *In re Wellington* (1935), 154 Misc. 271, 276 N.Y.S. 946.

In the matter of the *Estate of Bertha M. Rice, Deceased,* on application to file Assignments and to determine validity of said assignments; No. 200595 Probate Court of Franklin County, Ohio (May 6, 1963), 193 N.E.2d 566, the Court had under consideration a case which involved assignments running to American Archives Association. There the Court stated as follows:

Page 567:

"American Archives Association, by its attorneys, made application to this Court for admission of certain assignments executed by various persons having an interest in the distributive proceeds of the estate of Bertha M. Rice, deceased. The application also requested a determination of the validity of said assignments.

"The application to admit the assignments was excepted to by the Administratrix of the Estate and a hearing on said matter was requested and was held before the Judge of this Court.

* * *

"Two hearings were held before the Court and testimony taken of all witnesses and various and sundry documents were admitted into evidence.

* * *

Page 569:

"The question of the validity of the contract of assignment necessarily centers around the methods used by the American Archives Association in obtaining the 'agreements and assignments' and the consideration for same.

* * *

Page 571:

"The American Archives Association was contracting to sell information and representation, including

services of attorneys, for a forty (40) percent portion of all monies received by the interest holders from a possible share of an unknown estate.

"The methods used by American Archives Association go far beyond the furnishing of a genealogical survey or service. Genealogical services are certainly not per se the unauthorized practice of law. However, representation of individuals for the purpose of establishing their rights and aiding them to recover their shares, and engaging counsel for their mutual interest at forty (40) percent of the interest holders possible share, is against public policy and constitutes the unauthorized practice of law and involves champerty and maintenance.

"It is therefore the order of this Court that the motion of the applicant for admission and validation of their various assignments for joint payment with the individual beneficiaries be denied."

If there be any doubt that it is undesirable that counsel who represents and is paid by Archives should also represent individual heirs who made assignments to Archives, and whose representation was solicited by Archives, a brief examination of the record in the Gage Probate Case is most convincing. The record is replete with actions taken and things done which are completely foreign to the run of mine probate cases in which there did not exist this conflict of interests.

CONCLUSION

It is respectfully submitted:

1. That the judgment or Order, allegedly appealed from, merely dismissed the charges; the Court did not, by its Order, find the appellant guilty of the charges, and did not, by its Order, reprimand or censure the appellant; this appeal is not from the judgment or the Order but is, in effect, an attempt to have this Court remand the case to the

Trial Court with instructions to the Trial Court to strike portions of its opinion and findings; and, therefore, the appellant does not have the right to appeal, and the appeal should be dismissed.

In the event this Court concludes that appellant has the right to appeal, that then it is appropriate that this Court remand the case to the Trial Court with instructions to conform its Order to its opinion and findings, and that the appellant be held guilty of the charges and that the Trial Court disbar, suspend or censure the appellant, as it deems appropriate in keeping with the remand of this Court.

2. That the facts established that appellant's conduct in the matter of his representation of Archives and of the individual paternal heirs did violate Canons 6, 16, 27 and 35, and that the Trial Court was fully justified in its opinion and its findings in criticizing the conduct of the appellant; and that but for the indulgence granted by the Trial Court to the appellant, the appellant's conduct was such as to have justified a finding that appellant was guilty of the charges and the Trial Court would have been justified in administering such sanctions as it deemed appropriate.

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Attorneys for Appellee

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,732

DONALD M. SULLIVAN, *Appellant,*

v.

THE COMMITTEE ON ADMISSIONS AND GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Appellee.*

APPELLANT'S PETITION FOR REHEARING BY THE COURT EN BANC

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To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit:

Appellant, by his counsel, Joseph A. Fanelli, respectfully petitions this Court to set aside the opinion and decision rendered herein on March 3, 1967, and to grant him a rehearing by the Court *en banc.* In the alternative, should this Court decline to rehear the case *en banc,* appellant requests a rehearing by the panel of judges which originally heard the case. The petition is supported by the following facts and reasons.

1. *Circuit Judge Burger's opinion for the panel in support of its decision contains misstatements and omission of material fact.*—The opinion states (slip opinion, p. 2)[1] that American Archives Association located the fourteen heirs of the Gage Estate and secured assignments from twelve of them "before any of them had counsel." There is no support in the record for the quoted language. But its strong suggestion of overreaching by American Archives seriously prejudiced appellant, particularly in view of the fact, as shown below, that the opinion at important points holds appellant responsible for the acts of American Archives.

The opinion states (p. 2):

> As is Archives' usual practice the name of the estate was not disclosed until Archives had exhausted its efforts to induce all of the heirs to give assignments to it.

What is "the usual practice" of American Archives appears nowhere in the record. The content of the balance of the quoted statement accords with Appellee's Brief, page 2, where it is stated as a fact that "the name of the estate was not disclosed until Archives had exhausted its efforts to induce all of the heirs to give assignments to it." Appellee's brief cites its own *ex parte* "Report and Recommendations" as set forth at J.A. 26 for the statement of fact. But it is neither there, nor elsewhere in the "Report and Recommendations," nor anywhere in the record. Yet here again, appellant was prejudiced by this second strong suggestion of continuous and crafty pressuring of the heirs.

It was error for the panel to consider, and to set forth in its opinion, facts, or allegations of facts, that were not

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[1] All references to Judge Burger's opinion for the panel are to the slip opinion.

contained in the Stipulation upon which this cause was submitted below.[2]

The panel also allowed the record in another case between other parties to be made a part of the record in this appeal, although such other record was not included in the Stipulation upon which the cause was submitted below, thus overruling without mentioning *White* v. *Central Dispensary & Emergency Hospital,* 69 App. D.C. 122, 125, in which it was held that "a trial court cannot properly take judicial notice of the records in other proceedings before it between different parties." This so-called "Supplemental Record" was belatedly[3] certified by the lower court as the result of an oral *ex parte* motion made and granted without notice to appellant or his counsel. Although the *ex parte* order certifying said "Supplemental Record" recites that the trial court had taken "judicial notice" of and "considered" the record in the other case, any such judicial notice taken or consideration given to the record in the other case was unknown to appellant and his counsel, who were given no notice thereof, and first learned this when they received a copy of the signed *ex parte* order, that had been mailed by counsel for Appellee the day before the "Supplemental Record" was certified to this Court. This

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2 There can be no question that the panel went outside the stipulated facts for material crucial to its decision. At page 2 of the opinion, after the statement of a number of things of a factual nature, some of which are noted *supra,* the opinion states:

> "The *remaining* facts are developed in a stipulation entered into by the Appellant and the Committee in the District Court." (Emphasis supplied)

This was contrary to all the authorities, and overrules *sub silentio* this Court's decision in *Verkouteren* v. *District of Columbia,* 120 U.S. App. D.C. 361 (1965).

3 At the time the Supplemental Record was certified, the time for filing the record had long since expired. In fact, the appeal was so far along that appellant had filed his brief in typewritten form more than two weeks before the lower court entered its *ex parte* order certifying the "Supplemental Record".

unique procedure violated the rules of this Court (Rules 12 and 13), the Federal Rules of Civil Procedure,[4] the rules of the District Court,[5] and the constitutional right of appellant to notice, hearing, basic fairness, and procedural due process.[6]

The opinion omits entirely, and fails even to consider, crucial facts of record. On pages 2 and 4 the opinion recites part of the Stipulation of facts between the parties, but deletes entirely, and makes no reference to, the three exhibits that were integral and perhaps the most important parts of the Stipulation. Exhibit A (J.A. 15) is the assignment itself. Since there was no other proof in the record from which a champertous undertaking by American Archives could conceivably be gleaned, the assignment (which was entitled "Agreement and Assignment"), was basic for any consideration of the question of champerty. The fact is, however (and this can be determined readily by inspection of the document), that the assignment contains no undertaking by American Archives to maintain the heir's claim, and no undertaking by American Archives to bear the expenses of maintaining the claim. These are by definition indispensable elements of champerty. The panel's overlooking of this all-important fact resulted in its legally erroneous conclusion on champerty (See Point 2, *infra*).

Exhibits B and C to the stipulation are respectively Archives' letter to each assignor-heir which resulted in appellant's retention by the heir, and the authorization to appellant by each heir for such representaton. The letter

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[4] Rule 5(a), requiring service of notice of the motion; Rule 7(b), requiring the motion to be in writing; Rules 73(g) and 75(h).

[5] Rule 9(e) of the District Court, requiring two days' notice of an oral hearing on a motion.

[6] *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 81 L. Ed. 1093, holding retroactive use of doctrine of judicial notice to be "condemnation without trial."

(J.A. 17-18) specifically advised each heir that appellant had already been retained by American Archives to represent its interests under his (the heir's) assignment. The authorization (J.A. 18-19) signed by each heir specifically recites the heir's understanding of the fact that appellant was also representing the assignment interests of American Archives. The panel's overlooking of these two all-important exhibits resulted in its legally erroneous conclusion on conflict of interest (See Point 2, *infra*).

2. *The opinion of the panel enunciates new and confusing principles of law which contradict all precedent, and are supported by nothing more than the statement that they are "clear and plain" (p. 6).*—The whole of the panel's reasoning for affirming the District Court is set forth at page 6 of the opinion. The reasoning begins with the unexplained statement that the "undertaking" by American Archives was "inherently champertous." If "inherently champertous" means "champertous", the panel has, *sub silentio,* overruled every precedent of the Court on what is champerty. All of those precedents, as well as the authorities in other jurisdictions, require for champerty that there be an undertaking to prosecute and bear the costs of litigation (see Appellant's Brief, pp. 12-14). There is no such undertaking by American Archives or appellant here. If "inherently champertous" was intended by the panel to mean something different from "champertous," the law of the District of Columbia on champerty is, unless there be correction or further elucidation, left in confusion as to what the new and undefined concept of "inherently champertous", as distinguished from "champertous" may mean.[7]

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[7] From the factually unsupported finding that there was an undertaking of American Archives that was "inherently champertous", the opinion immediately proceeds to statement of the conclusion without more that *American Archives'* communication to the heirs which resulted in appellant's employment by the heirs is "forbidden solicitation of professional work." Yet such conclusion is directly contrary to Opinion 111 of the American Bar Association's Committee on Professional Ethics and Grievances, and contrary to a recent decision of the Supreme Court of the United States

The panel's finding of American Archives' "undertaking" to be "inherently champertous" supplies the essential premise for the core of the panel's decision, i.e., that appellant was involved in an "actual and present conflict of interest." Contrary to the panel's statement, the District Court made no finding on conflict of interest. If, nevertheless, appellant's dual representation of American Archives and the heirs had involved a conflict of interest, all parties were informed of the dual representation and consented to it. With all parties so informed and consenting, appellant did not improperly undertake such dual representation. As is explicitly provided by Canon 6 of the Canons of Professional Ethics, it is not improper for a lawyer to represent conflicting interests if all interests are advised of the facts—as was the case here. If Canon 6 is to be disapproved, the full Court should do it; and, fairly, appellant should not get affirmance of his censure for conduct that precedes such disapproval.[8] Finally, the panel states that

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(*Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, decided in 1964), and contrary to all recognized authorities on professional ethics (See Drinker, Legal Ethics, p. 251 and p. 66, and authorities cited therein). Opinion 111, referred to above, makes it quite clear that an attorney is permitted to "accept as clients persons in a similar situation to that of his (original) client" if they, "without his active intervention" be "persuaded by his (original) client to employ him." There was no proof, nor any contention, that appellant solicited any employment, and the panel's opinion speaks only of solicitation by American Archives, but, as shown above, the so-called "solicitation" by American Archives was entirely permissible.

[8] It is unsound and unjust to censure appellant for failing to treat as "void" an assignment identical in form to an assignment to American Archives Association that was held to be valid and enforceable by the District Court in 1959 in the *Lott Estate*. See *Estate of Clyde R. Lott, Deceased*, Admn. No. 86,184, in which the District Court entered an order on May 1, 1959 specifically recognizing such assignment and directing the administrator to distribute directly to American Archives its assigned fraction (⅓) of the heirs' interests. Being identical in form, that assignment likewise contained no "undertaking" on the part of the assignee. The District Judge in that case did not conjure up a "champertous undertaking" where none existed, nor should appellant be expected to have conjured up one out of an identical form of assignment. Had appellant advised the heirs, as the opinion says he "might well" have done, that (1) an unqualified and unconditional

the conflict it sees would tend to silence advice by appellant to the heirs of the invalidity of the assignments. Here again the panel leaves the law in a state of confusion; for the assignments were not champertous, and there was no fraud or overreaching that might otherwise invalidate them.[9]

The conclusions of the panel in respect of Canon 16, Restraining Clients from Improprieties, Canon 28, Stirring up Litigation, and Canon 35, Intermediaries, are similarly not supported by the stipulated facts. Canon 16 and 35 are apparently concerned with the supposed solicitation, which has already been shown did not occur. The dragging in of Canon 28 is incomprehensible. The filing of claims on behalf of theretofore missing and unknown heirs in an estate proceeding in which there were already pending a petition by an alleged creditor who claimed the decedent

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assignment of a property interest in an heir's share in an estate is a "contingent fee contract", and (2) that it is "void" because of an imaginary "undertaking" it does not contain, he would not have been acting as a lawyer but as a misinformed troublemaker, attempting to stir up litigation without justification in fact or in law—precisely what Canon 28 prohibits.

The conclusion in the opinion that an attorney employed by several clients having a community of interest in the same subject-matter, one of whom is paying his fee, owes a "prime" duty to that client, to the detriment of others, is a strange pronouncement, with which lawyers generally will strongly disagree. See A.B.A. Opinion 282, which particularly relates to lawyers defending in insurance cases, who are furnished, retained and paid by the insurance carrier. It is a perversion of the concept of the relationship between attorney and client to say that as between several clients of an attorney who have a community of interest in the same subject-matter, there is a primacy of one client over the others because that client first employed the attorney in the matter, or because that client is to pay his fee, and that the attorney therefore owes a "prime" duty to that client; and it is unfair and improper gratuitously to attribute such a perverted concept to appellant.

[9] Absent such fraud or overreaching, an assignment from an heir to an heir-finder is not inherently invalid or champertous. See Opinion of Supreme Court of Rhode Island in *Sparne* v. *Altschuler*, 90 A. 2d 919, 80 R. I. 96 (1950), and cases cited therein, upholding agreements between heirs and heir-finders respecting shares of their inheritances:

> ". . . agreements of this sort have been uniformly held to be good." (90 A. 2d 919, 923).

had died without heirs, and a petition by the District of Columbia claiming escheat because the decedent had died without heirs, is the very antithesis of stirring up litigation.

3. *Conclusion.*—For the facts and reasons stated, the Court should rehear the case, and upon such rehearing reverse. The Court should do this, first because an honorable member of the bar is censured by the panel's decision for conduct not anywhere considered improper before this case. (The panel concedes at page 7 of its opinion that this is a case of first impression). Second, the Court should rehear the matter, so as to clarify the confusion in the law of champerty and conflict of interest (and the other Canons included by the panel) resulting from the panel's decision.

Finally, and in accordance with the District Court's own recommendation, we stress that the relationship between heir-finders [10] and counsel can best and most fairly be regulated by rule-making. In such rule-making, any aspect of such relationship deemed potentially or actually undesirable, can be regulated or prohibited, even though not heretofore considered to be improper. But it is in our view rather plainly unconscionable to seek to accomplish the same end without rule-making, at the expense of a reputable member of the Bar: [11] to punish him for violation of an unpromulgated rule, by censuring him for conduct not there-

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[10] A comparatively new and growing industry performing a needed service in a massive urbanized society where family ties and records are becoming more and more diluted and scattered.

[11] Stipulation filed May 6, 1965:

> "4. At the time of his retainer by the American Archives Association, the Respondent knew that in similar cases, for many years, and right up to the time of his retainer in the Gage matter, other reputable attorneys practicing in the District of Columbia, known personally to him, had represented and been retained by both the American Archives Association and the heirs who had made assignments of portions of their interests to it.
>
> 5. Respondent undertook his representation of the American Archives Association and the heirs in good faith. * * *" (J.A. 13).

tofore considered improper in any published authority or precedent, and to do this on the basis of facts not in the record.

Respectfully submitted,

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Counsel for Appellant

Certificate of Counsel

Undersigned counsel certifies that the foregoing Petition for Rehearing by the Court *en banc* is filed in good faith and not for purposes of delay.

JOSEPH A. FANELLI
Counsel for Appellant